No. _____

In The

Supreme Court of the United States

DAVID BOWMAN,

Petitioner,

v.

AMERICAN RIVER
TRANSPORTATION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The question presented by this case is:

1. Where Federal Courts of Appeals have unanimously held that the "election clause" of the Merchant Marine Act of 1920, 46 U.S.C. §688(a) ("the Jones Act") confers on the seaman-plaintiff the exclusive right to determine the form of trial, jury or non-jury, and the Fifth Circuit has specifically held that this construction applies in a state court proceeding, may a state court reject those decisions and apply state law to create a jury trial right in the Jones Act defendant?

The Illinois Supreme Court's decision refused to follow an unbroken line of federal precedent to answer the question in the affirmative. Because this case implicates the significant national issue of the uniform application of maritime law and because the Illinois Supreme Court's holding conflicts with decisions of at least three United States Courts of Appeals, plaintiff respectfully submits that *certiorari* should be granted. *See, e.g., Norfolk & Western Ry. Co. v. Liepelt,* 444 U.S. 490, 493, 100 S.Ct. 755, 757, 62 L.Ed.2d 689, 693 (1980) (granting *certiorari* to resolve conflict in courts' treatment of evidence of taxation in Federal Employers' Liability Act[1] cases); and *see, e.g., Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952) (granting *certiorari* "because the decision of the Supreme Court of Ohio appeared to deviate from previous decisions of this Court that federal law governs cases arising under the Federal Employers' Liability Act." 342 U.S. at 361.)

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[1] 35 Stat. 65, as amended, 45 U.S.C. §§51-60, hereinafter FELA.

STATEMENT OF INVOLVED PARTIES

Petitioner David Bowman is an individual. Respondent American River Transportation Company is a wholly-owned subsidiary of Archer Daniels Midland Company.

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The order of the Illinois Appellate Court is unreported. (Pet. App. 28-46)

The order of the Circuit Court of St. Clair County, Illinois is unreported. (Pet. App. 47-48)

STATEMENT OF JURISDICTION

The judgment and order of the Supreme Court of Illinois were entered on October 20, 2005. No petition for rehearing or reconsideration was filed. The petition invokes this Court's jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

46 U.S.C. §688(a) Recovery for Injury to or Death of Seaman (a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all

statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Respondent American River Transportation Company ("ARTCO") employed petitioner David Bowman as a seaman on board its vessel, the *M/V Bill Pehler* on the Upper Mississippi River near St. Louis. (Pet. App. 55) On May 25, 2001, petitioner was working as a deckhand when a defective cable broke apart, struck his leg and broke his right tibia. (Pet. App. 2) Petitioner underwent surgery to insert a rod inside the broken bone and was off of work for about six months. (Pet. App. 2)

Petitioner filed suit in an Illinois state court against respondent for negligence under the Jones Act, 46 U.S.C. §688, and for breach of the warranty of seaworthiness and for maintenance and cure under the general maritime law. (Pet. App. 53-65) At trial, respondent stipulated to liability. (Pet. App. 1)

Petitioner moved to strike the Respondent's jury demand on the ground that Respondent had no right to a jury trial under the Jones Act. (Pet. App. 51-52) The motion invoked the Illinois Appellate Court's decision in *Allen v. Norman Brothers, Inc.*, 286 Ill.App.3d 1091, 1094-1095, 678 N.E.2d 317, 319 (1997), that had recognized the unanimity of federal court decisions holding that the defendant was not entitled to a jury trial under the Jones Act. (Pet. App. 51) The trial court, Circuit Judge Lloyd

Cueto, granted the motion to strike the jury demand and transferred the case to the court's non-jury docket. (Pet. App. 49)

After defendant stipulated to liability, the case proceeded to trial before Associate Circuit Judge Walter Brandon. After accepting the parties' stipulations and hearing evidence, the circuit court found in favor of petitioner and awarded him $325,000.00 in damages "for pain and suffering and disability and disfigurement." (Pet. App. 47-48) In addition, the trial court ordered defendants to pay $7,200.00 for unpaid maintenance and $7,200.00 as attorneys' fees for defendants' failure to pay maintenance. (Pet. App. 48) Respondent filed a timely appeal to the Illinois Appellate Court from this judgment and the order striking the jury demand.

The respondent's right to a jury trial under the Jones Act was the primary issue on appeal. Respondent urged the appellate court to conclude that its prior holding incorrectly "held that the right to a trial by jury is governed solely by federal law." (Pet. App. 32) The Illinois Appellate Court, through Presiding Justice Melissa Chapman with Justices Clyde Kuehn and Terrence Hopkins concurring, rejected that invitation and unanimously affirmed the order striking the jury demand. The court vacated that portion of the trial court's judgment for attorney fees and modified the award of maintenance but in all other respects, the Appellate Court affirmed the judgment.

The Illinois Supreme Court exercised its power of discretionary review to grant respondent's petition for leave to appeal (Pet. App. 50) and, in a unanimous opinion by Justice Lloyd Karmeier, reversed the judgment on the

federal jury trial issue. The Illinois court of last resort recognized the contrary precedent from the United States Courts of Appeals.

> We acknowledge that in *Rachal* [*v. Ingram Corp.*, 795 F.2d 1210 at 1215 (5th Cir. 1986)], the federal district court held that the 'Jones Act gives only the seaman-plaintiff the right to choose a jury trial,' and in *Craig* [*v. Atlantic Richfield Co.*, 19 F.3d 472, 476 (9th Cir. 1994), *cert. denied,* 513 U.S. 875, 115 S.Ct. 203, 130 L.Ed.2d 133], the court found '[t]he plain language of the Jones Act gives a *plaintiff* the option of maintaining an action at law with the accompanying right to a jury trial * * * [and] makes no mention of a defendant.' (Emphasis in original.) Further, in *Linton* [*v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1490 (5th Cir. 1992), *cert. denied,* 506 U.S. 975, 113 S.Ct. 467, 121 L.Ed.2d 375 (1999)], the court held that 'the Jones Act allows the injured seaman to elect a non-jury trial "at law" in a state court.'

Bowman, *supra*, 217 Ill.2d 75, 838 N.E.2d 949, 957 (Pet. App. 15)

Yet, the Illinois court expressly refused to follow this substantial and unanimous line of federal precedent. "However, this court has now stated its agreement with the *Hutton* [*v. Consolidated Grain & Barge Co.*, 341 Ill.App.3d 401, 795 N.E.2d 303 (2003)] opinion and, in turn, its disagreement with *Rachal* and the line of cases which has furthered its reasoning." *Bowman*, *supra*, 217 Ill.2d 75, 838 N.E.2d 949, 957 (Pet. App. 15-16)

Instead of accepting the unanimous construction of the federal courts, the Illinois Supreme Court applied its own rules of statutory construction to a selected portion

of the statute to decide that "the rules of statutory construction clearly establish that the 'election' referred to in the Jones Act is *not* the seaman's election of a trial by jury, but his election to proceed 'at law' rather than in admiralty." *Bowman*, *supra*, 217 Ill.2d 75, 838 N.E.2d 949, 954 (Pet. App. 9) (emphasis in original). The Illinois court concluded that state law, rather than federal law, controlled whether a Jones Act defendant had a jury trial right in state court.

Although the Illinois Supreme Court had previously held that the Illinois constitution did not guarantee a right to trial by jury causes of action arising under state statutes that modified common law causes of action (*see Martin v. Heinold Commodities, Inc.*, 163 Ill.2d 33, 643 N.E.2d 734 (1994) (no jury trial under state consumer fraud statute even though statute provides common law remedy), the court chose to apply a different rule to the federal statutory cause at issue on the ground that:

> while the Jones Act is a statute, its purpose was to reestablish the long-standing common law right of seamen to sue for negligence which *The Osceola* had taken away. As defendants aptly state, 'the essence of a Jones Act suit is still common law negligence, which has always been the subject of jury trials in Illinois.' We therefore conclude that Jones Act defendants litigating in Illinois courts have the right to a trial by jury under our state constitution.

Bowman, *supra*, 217 Ill.2d 75, 838 N.E.2d 949, 961 (Pet. App. 23)

Finally, the Illinois court read this Court's decision in *Fitzgerald v. United States Lines, Co.*, 374 U.S. 16, 21, 83 S.Ct. 1646, 1650, 10 L.Ed.2d 720, 725 (1963) to require a

jury trial on petitioner's general maritime claims for unseaworthiness and for maintenance and cure.

This petition for *certiorari* follows.

ARGUMENT FOR ALLOWANCE OF THE WRIT

A. THE DECISION OF THE ILLINOIS SUPREME COURT CONFLICTS WITH DECISIONS OF FEDERAL COURTS OF APPEALS ON AN IMPORTANT FEDERAL QUESTION THAT IMPLICATES SIGNIFICANT ISSUES OF MARITIME UNIFORMITY

1. The Decision Conflicts With The Unanimous Holdings Of Federal Courts That The Jones Act Confers The Right To Elect A Jury Trial Solely On The Seaman Plaintiff

The decision of the Illinois Supreme Court directly conflicts with the decision of the Fifth Circuit United States Court of Appeals in a very similar case which held that "the Jones Act allows the injured seaman to elect a non-jury trial 'at law' in a state court." *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1490 (5th Cir. 1992). In addition, the Illinois court's decision conflicts with numerous federal court decisions holding that the Jones Act confers upon the plaintiff a unilateral right to select the form of trial. *See, e.g., Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 475-476 (9th Cir. 1994); *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1212-1213 (5th Cir. 1986); *Texas Menhaden Co. v. Palermo*, 329 F.2d 579, 580 (5th Cir. 1964); *McCarthy v. American Eastern Corp.*, 175 F.2d 724,

726 (3rd Cir. 1949), *cert. denied, American Eastern Corp. v. McCarthy*, 338 U.S. 868, 70 S.Ct. 144, 94 L.Ed. 532 (1949), *rehearing denied*, 338 U.S. 939, 70 St.Ct. 343, 94 L.Ed. 579 (1950). There are no contrary federal court decisions.

The *Linton* case, *supra*, 964 F.2d 1480, came before the Fifth Circuit Court of Appeals after the Jones Act defendant had removed to federal court the plaintiff's non-jury state court Jones Act case. The district court refused to remand the cause believing that the non-jury designation placed the case within the exclusive admiralty jurisdiction of the federal courts. The plaintiff appealed and the Fifth Circuit reversed the denial of remand. In a scholarly opinion written by Circuit Judge E. Grady Jolly – one of the most respected admiralty jurists of the twentieth century – the court construed the Jones Act to confer on the injured seaman the exclusive right to determine whether the case would be tried to a judge or to a jury. "We, thus, conclude that the Jones Act allows the injured seaman to elect a non-jury trial in an action 'at law' in a state court, and such election does not, without more, convert the action to one in admiralty." *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1489 (5th Cir. 1992), *cert. denied*, 506 U.S. 975, 113 S.Ct. 467, 121 L.Ed.2d 375.

The Ninth Circuit later expressed its agreement with this construction. "The Fifth Circuit has held that in actions where a federal court's sole basis for jurisdiction is under the Jones Act, only the plaintiff has a right to demand a jury trial. [citations omitted] We agree. The plain language of the Jones Act gives a plaintiff the option of maintaining an action at law with the accompanying right to a jury trial. The Act makes no mention of a defendant." *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 475-476 (9th Cir. 1994).

The Illinois court acknowledged this authority but rejected it in favor of an Illinois appellate decision authored by a split panel. *See Bowman, supra*, 217 Ill.2d 75, 838 N.E.2d 949, 957 (Pet. App. 15-16)

The Illinois court's decision further conflicts with this Court's rationale in *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 392-393, 44 S.Ct. 391, 396, 68 L.Ed. 748 (1924), where the Court concluded that the Jones Act "permits injured seamen to elect between varying measures of redress and between different forms of action *without according a corresponding right to their employers* * * *." *Panama Railroad, supra*, 264 U.S. 375, 392, 44 S.Ct. at 396, 68 L.Ed. 748 (emphasis added). This Court explained that "[i]n the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought." *Panama Railroad, supra*, 264 U.S. at 393.

The Illinois court's decision significantly departs from maritime uniformity in both its conclusion and in its avowed departure from well-established federal precedent. This Court has not hesitated to correct a state court's failure to conform its interpretation of a federal statute to established federal decisions interpreting that statute. *See, e.g., Norfolk and Western Railway Co. v. Hiles*, 516 U.S. 400, 116 S.Ct. 890, 134 L.Ed.2d 34 (1996) (reversing judgment under the Safety Appliance Act, 49 U.S.C. §20302(a)(1)(A)).

The cause *sub judice* is a significant departure from maritime uniformity and petitioner respectfully submits that it merits consideration by this Court because this Court has traditionally acted to maintain the uniformity of

admiralty and maritime law. *See, e.g., McDermott International, Inc. v. Wilander,* 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991); *Chandris, Inc. v. Latsis,* 515 U.S. 347, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995); *Harbor Tug & Barge Co. v. Papai,* 520 U.S. 548, 117 S.Ct. 1535, 137 L.Ed.2d 800 (1997); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244, 63 S.Ct. 246, 249-250, 87 L.Ed. 239 (1942).

2. This Case Is Of General Importance Because The Jury Trial Issue Is A Threshold Question In Every Jones Act Case

This issue is of general importance because it inheres in every Jones Act case filed in either federal or state courts in that the plaintiff must always, as a threshold matter, decide whether to choose a bench or jury trial. Demonstrating the ubiquitous nature of the issue, numerous federal and state decisions have analyzed the question. *See, e.g., Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 475-476 (9th Cir. 1994); *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1489 (5th Cir. 1992); *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1212-1213 (5th Cir. 1986); *Texas Menhaden Co. v. Palermo*, 329 F.2d 579, 580 (5th Cir. 1964); *McCarthy v. American Eastern Corp.*, 175 F.2d 724, 726 (3rd Cir. 1949); *Hahn v. Nabors Offshore Corp.* (La.App.2002), 820 So.2d 1283, *writ denied*, 828 So.2d (La.2002); *Hearn v. American River Transportation Co.*, 303 Ill.App.3d 619, 707 N.E.2d 1283 (1999), *appeal denied,* 184 Ill.2d 557, 714 N.E.2d 527 (1999); *Gibbs v. Lewis & Clark Marine, Inc.*, 298 Ill.App.3d 743, 700 N.E.2d 227, 230 (1998); *Peters v. City and County of San Francisco*, 1995 A.M.C. 788, 790-792 (Cal.App. 1995) (unpublished in state reporter); *Allen v. Norman Brothers, Inc.*, 286

Ill.App.3d 1091, 1094, 678 N.E.2d 317 (1997). Petitioner respectfully submits that these cases have fully developed the issue for this Court's consideration.

A review of the cited cases establishes that since 1949 the federal courts have consistently and unanimously held that the Jones Act defendant has no right to a jury trial. Recent state court decisions in Illinois (*Bowman*, *supra*) and Louisiana (*Hahn*, *supra*) represent a serious schism with the uniform construction by the federal courts.

a. The United States Supreme Court has held that the FELA jury trial right is a matter of substance and not procedure

The Illinois court's decision cannot simply be dismissed as a proper application of state procedure to federal substantive law such that the attention of this Court is unwarranted. This Court's decision in *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952) established that the jury trial provision of the FELA is a substantive component of the statutory scheme rather than a procedural incident subject to state court deviations.

The *Dice* Court noted that Congress had granted injured railroad workers a right to recover damages caused by an employer's negligence. "State laws are not controlling in determining what the incidents of this federal right shall be." *Dice, supra*, 342 U.S. at 361, 72 S.Ct. at 314. The Court noted its previous holding that the right to trial by jury is "'part and parcel of the remedy

afforded railroad workers under the Employers' Liability Act.'" *Dice, supra*, 342 U.S. at 363, 72 S.Ct. at 315, *quoting Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444 (1943). The Court concluded that "[i]t follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used." *Dice, supra*, 342 U.S. at 363, 72 S.Ct. at 315.

Because the jury trial right is a significant component of the statutory scheme, the existence of that right cannot be left to vagaries of state procedure. "Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes. *See Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244, 63 S.Ct. 246, 250, 87 L.Ed. 239, and cases there cited." *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 362, 72 S.Ct. 312, 96 L.Ed. 398 (1952).

b. By incorporating the FELA, the Jones Act adopts the substantive nature of the jury trial right

The Jones Act incorporates the FELA by specific reference. *See* 46 U.S.C. §688(a). The United States Supreme Court has "held that the Jones Act is to have a uniform application throughout the country unaffected by 'local views of common law rules.' [citation] The Act is based upon and incorporates by reference the Federal Employers' Liability Act, [citation], which also requires uniform interpretation." *Garrett v. Moore-McCormack Co.*,

317 U.S. 239, 244, 63 S.Ct. 246, 249-250, 87 L.Ed. 239 (1942).

The Jones Act's express incorporation of the FELA necessarily imports the latter statute's jury trial right into the action authorized by the former statute. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 325, 112 L.Ed.2d 275 (1990) (Congress incorporated FELA "unaltered into the Jones Act * * * ."); *see also Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 121 S.Ct. 993, 1004-1005, 148 L.Ed.2d 931 (2001) (Jones Act incorporates anti-removal provision of FELA); *Kernan v. American Dredging Co.*, 355 U.S. 426, 431, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958); (Jones Act's reference to FELA also incorporates latter statute's imposition of liability for statutory violation even in absence of negligence). Thus, the *Dice* Court's determination that the jury trial right of the FELA is a matter of substance rather than procedure is fully applicable in the context of this Jones Act case.

Characterizing the right to elect the forum of trial as substantive makes sense in light of the Court's determination that the jury trial right is part of the statutory "remedy." *See Dice, supra*, 342 U.S. at 363, 72 S.Ct. at 315. Permitting the Illinois decision to stand would mean that the exercise and application of the Jones Act *remedy* would be altered depending on whether the case was filed in state or federal court.

The Illinois court held "that the availability of a jury trial in Jones' Act cases is a question that is properly controlled by the normal laws of the forum." *Bowman, supra*, 217 Ill.2d 75, 838 N.E.2d 949, 959 (Pet. App. 19-20). This ruling destroys the basic principle of uniformity underlying the Court's decision in *Dice, supra*, 342 U.S.

359, by subordinating the federal statutory right to vagaries of practice in the various states.

This Court previously rejected a similar contention in reversing a Pennsylvania Supreme Court decision that had enforced a release of claims against a seaman on the ground that the burden of proof to establish a release was a procedural issue governed by state law. *See Garrett, supra*, 317 U.S. 239, 243, 63 S.Ct. 246, 249. The United States Supreme Court phrased the issue as "having voluntarily opened its courts to petitioner, the questions are whether Pennsylvania was thereupon required to give to petitioner the full benefit of federal law and if so whether it failed to afford that benefit." *Garrett, supra*, 317 U.S. 239, 243, 63 S.Ct. 246, 249 (footnotes omitted).

The Court rejected the contention that the application of Pennsylvania law was a procedural issue.

> It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try actions either under the Merchant Marine Act or in personam such as maintenance and cure. The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure.

Garrett, supra, 317 U.S. 239, 245.

Petitioner's right to select the form of trial is a substantive FELA right under *Dice, supra*, 342 U.S. at 363, 72

S.Ct. at 315, and which is therefore incorporated into the Jones Act. *See, e.g., Miles, supra,* 498 U.S. 19, 32, 111 S.Ct. 317, 325, 112 L.Ed.2d 275; *Garrett, supra,* 317 U.S. 239, 244, 63 S.Ct. 246, 249-250. The State of Illinois therefore may not deny petitioner's federally guaranteed right to elect the form of trial by couching that denial as mere procedure.

c. The Illinois decision does not rest on an adequate state ground because state law cannot abridge petitioner's substantive federal rights under the Jones Act

Because the federal statute confers on the plaintiff a substantive right to elect a bench trial, state procedure cannot alter or abridge that legislative grant. *See, e.g., Dice, supra,* 342 U.S. 359, 363, 72 S.Ct. 312, 315 (FELA jury trial provision is substantive right that cannot be altered by state procedure); *Norfolk & Western Ry. Co. v. Liepelt,* 444 U.S. 490, 493, 100 S.Ct. 755, 757, 62 L.Ed.2d 689 (1980) (measure of damages in FELA case is a matter of federal substantive law and state court may not substitute its own damage instruction); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 78 S.Ct. 1201, 2 L.Ed.2d 1272 (1958) (state courts may not apply a state's statute of limitations to shorten the time within which federal law authorizes a seaman to sue); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942) (federal law and not state law controls conclusiveness of seaman's release of claims); *Engel v. Davenport*, 271 U.S. 33, 38, 46 S.Ct. 410, 412, 70 L.Ed. 813 (1926) (Jones Act statute of limitations cannot be shortened by state statute); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59

S.Ct. 262, 83 L.Ed. 265 (1939) (common law defenses such as assumption of the risk or contributory negligence as a bar to suit are not available in a Jones Act case even though state law would authorize their application). Thus, regardless of the Illinois Supreme Court's interpretation of state law, that state law cannot defeat petitioner's federal statutory right to determine the form of trial.

3. The Issue Is Of General Importance Because The Illinois Court's Holding Encourages Seamen Desiring Bench Trials To Shift Suits From State To Federal Courts

Although the popular perception may be that plaintiffs in injury cases generally prefer a jury trial to a bench trial, the practical reality is that a shorter time to trial is often more desirable than a potentially larger, but delayed, verdict.[2] The Illinois Supreme Court, for example, has taken judicial notice "that a plaintiff who desires a jury trial in the circuit court of Cook County must wait approximately two years longer than those willing to have a bench trial." *Hernandez v. Power Construction Co.*, 73 Ill.2d 90, 96-97, 382 N.E.2d 1201, 1204 (1978); *see also Paul H. Schwendener, Inc. v. Larrabee Commons Partners*,

[2] For a discussion of the vulnerability with which the courts have traditionally perceived seamen, *see, e.g., The DAVID PRATT*, 1 Ware 509, 7 F. Cas. 22, 24-25 (D.Me. 1839) ("Seamen are not a class of men who ordinarily make provision against the future. On their return from a voyage they are usually dependent on their wages for present support, and if they are withheld they ordinarily find themselves in a state of entire destitution, not only without present means to provide for their immediate and most pressing necessities, but without credit.")

338 Ill.App.3d 19, 29-30, 787 N.E.2d 192, 200 (2003) (noting six year delay in obtaining jury trial in Chicago).

The practical consequence of the Illinois court's holding is to encourage seamen to shift run-of-the-mill injury cases from state to federal courts thus taking advantage of the unquestioned right of an admiralty plaintiff to seek a bench trial in order to minimize the delay prior to trial.

4. This Case Is The Appropriate Vehicle To Resolve The Issue

Congress has not amended the "election clause" of the Jones Act in over eighty-five years. This remains so despite this Court's criticism of the statute as "not the product of careful drafting or attentive legislative review. . . ." *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 283, 100 S.Ct. 1673, 1678, 64 L.Ed.2d 284 (1980). Thus, corrective legislative action is unlikely. Moreover, resolution of the issue by this Court presents a practical solution to the problems created by the Illinois court's decision because a "bright line" answer to the question presented can be given.

This case presents a fully developed record in which the federal issue was extensively briefed by the parties and analyzed fully by the lower courts. The case proceeded to final judgment and is not interlocutory. In addition, the question presented is not fact dependent because it involves the determination of a specific legal right conferred on all seamen by the federal legislation. The case does not implicate extraneous issues such as seaman status or vessel status.

B. THE ELECTION AUTHORIZED BY THE STATUTE INCLUDES THE UNILATERAL RIGHT TO DETERMINE BOTH THE FORUM AND THE FORM OF TRIAL

1. Confining The Phrase "At His Election" To "Action For Damages At Law" Renders The Phrase "With The Right Of Trial By Jury" Superfluous In Light Of The Statute's Incorporation Of The Jury Trial Right Of The FELA

This Court has cautioned that it does not interpret statutory terms in isolation but rather "we follow 'the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it.' *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 596, 124 S.Ct. 1236, 1246, 157 L.Ed.2d 1094 (2004)." *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S.Ct. 2276, 2287, 159 L.Ed.2d 172 (2004). Instead of applying this principle, the Illinois Supreme Court focused on an isolated portion of the statute to decide that the Jones Act did not authorize petitioner to select a non-jury trial in state court. The Illinois court concluded that, contrary to every federal court to have considered the issue,

> We believe that anyone well versed in statutory construction, or even English grammar, would find the plain language of that sentence clearly states that the 'election' to be made by the seaman pertains to his choice to maintain an action 'at law,' and not his election of a 'right of trial by jury.'

Bowman, *supra*, 217 Ill.2d 75, 838 N.E.2d 949, 953 (Pet. App. 7)

The Illinois court's construction of the statute erred in omitting from its analysis any consideration of the rest of

the statute or even the complete sentence that the court purported to construe. The Illinois Supreme Court expressly stated that it limited its inquiry to "[t]he key sentence of the Jones Act at issue here [which] states: 'Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury' (46 U.S.C. §688(a) (2000))." 217 Ill.2d 75, 838 N.E.2d 949, 953 (Pet. App. 7) But neither the statute nor the cited sentence ends where the court's analysis terminated.

The rest of the statute splits an incorporation of the FELA into separate provisions for injury and for death cases, each of which contains a separate statement adopting the FELA

> "*and in such action* all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. * * * "

46 U.S.C. §688(a) (emphasis added).

This statutory incorporation confers on the seaman the negligence action of the FELA including various features peculiar to the FELA. *See, e.g.*, 45 U.S.C. §56 (conferring concurrent jurisdiction over FELA cases on state and federal courts). Most significantly for a proper interpretation of the Jones Act's election clause, the FELA

also provides a jury trial right. *See Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444 (right to trial by jury is "part and parcel of the remedy afforded railroad workers under the Employers' Liability Act.")

By eliminating the FELA incorporation clause from its consideration, the Illinois Supreme Court erroneously concluded that the selection of a state court forum was the sole implementation of the "election" conferred by the statute. But the Illinois court's construction of the "election" clause to exclude the phrase "the right of trial by jury" renders the latter phrase redundant of the jury trial right that inheres in the FELA This Court has explained that such a construction should be avoided. "The rule against superfluities complements the principle that courts are to interpret the words of a statute in context. *See* 2A N. Singer, Statutes and Statutory Construction §46.06, pp. 181-186 (rev. 6th ed. 2000) ('A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant * * * .' (footnotes omitted))." *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S.Ct. 2276, 2286, 159 L.Ed.2d 172 (2004).

In order to give effect both to the jury trial right provided by the incorporation of the FELA and to the specific phrase "with the right of trial by jury" the latter phrase must be read in conjunction with the phrase "at his election". The Fifth Circuit expressly read the statute in this fashion. "We, thus, conclude that the Jones Act allows the injured seaman to elect a non-jury trial in an action 'at law' in a state court, and such election does not, without more, convert the action to one in admiralty." *Linton v.*

Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1489 (5th Cir. 1992).

The Ninth Circuit expressed its agreement with this construction. "The Fifth Circuit has held that in actions where a federal court's sole basis for jurisdiction is under the Jones Act, only the plaintiff has a right to demand a jury trial. [citations omitted] We agree. The plain language of the Jones Act gives a plaintiff the option of maintaining an action at law with the accompanying right to a jury trial. The Act makes no mention of a defendant." *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 475-476 (9th Cir. 1994).

This Court's decision in *Panama Railroad, supra*, 264 U.S. 375, also provides strong support for this interpretation. The Court there concluded that the Jones Act "permits injured seamen to elect between varying measures of redress and between different forms of action *without according a corresponding right to their employers* * * * ." *Panama Railroad, supra*, 264 U.S. 375, 392. The Court's statement that the election clause authorizes the seaman to choose between both varying measures of redress *and* between different forms of action is significant because it dispels the notion that there is only one "election" contemplated by the statute. The "varying measure of redress" refers to the seaman's choice of a remedy in negligence under the then-new Jones Act or under the general maritime law warranty of seaworthiness. *See Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325, 47 S.Ct. 600, 604, 71 L.Ed. 1069 (1927); *see also McCarthy v. American Eastern Corp.*, 175 F.2d 724 (3rd Cir. 1949) ("election clause" does not require seaman to choose between negligence and unseaworthiness remedies prior to verdict).

The "different forms of action" refers to the choice between a jury and a non-jury trial. "The 'election' contemplated by the Jones Act is primarily a decision as to the form of trial – whether jury or non-jury." *McAfoos v. Canadian Pacific Steamships, Ltd.*, 243 F.2d 270, 273 (1957), *cert. denied, Canadian Pacific Steamships, Ltd. v. McAfoos*, 355 U.S. 823, 78 S.Ct. 32, 2 L.Ed.2d 39. This is as true in state courts as it is in federal courts for "[t]here is no dearth of example of the obligation on law courts which attempt to enforce substantive rights arising from admiralty law to do so in a manner conforming to admiralty practice." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243, 63 S.Ct. 246, 250, 87 L.Ed. 239 (1942).

2. Congress Specifically Authorized "Either Party" To Demand A Jury Trial In Certain Classes Of Cases Thus Clarifying That Congress Intended The Jones Act To Confer A Unilateral Election On The Seaman

Congress has specifically authorized Jones Act defendants in certain classes of cases to obtain a jury trial. *See* 28 U.S.C. §1873. The so-called "Great Lakes Statute" provides that "[i]n any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it." 28 U.S.C. §1873. The Great Lakes statute was adopted in 1845; Congress enacted the Jones Act in 1920. Thus, when

Congress conferred the statutory election upon the seaman to "elect" the form of trial, it did so in the context of an existing statute that conferred upon *both* parties the right to choose a jury trial in certain circumstances.

This Court has previously observed in the context of interpreting the Jones Act that "[w]e assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 325, 112 L.Ed.2d 275 (1990) (FELA's prohibition against recovery of non-pecuniary damages in death cases is incorporated into the Jones Act). Although the existing Great Lakes Statute included specific language authorizing trial by jury "if either party demands it", the Jones Act, instead authorized only the plaintiff to make an "election" as to the form of trial. As the Ninth Circuit observed, "[t]he plain language of the Jones Act gives a plaintiff the option of maintaining an action at law with the accompanying right to a jury trial. The Act makes no mention of a defendant." *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 476 (9th Cir. 1994). The Great Lakes Statute provides strong evidence that Congress intended to confer on Jones Act seamen the exclusive right to demand a jury trial under the statute.

CONCLUSION

The petition for writ of certiorari should be granted in this case to maintain the uniformity of maritime law previously established by this Court and the federal courts of appeals and to resolve the conflict between the federal

and state courts in an issue of significant national interest.

Respectfully submitted,

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2005 WL 2693294

Supreme Court of Illinois.
David W. BOWMAN, Appellee,
v.
AMERICAN RIVER TRANSPORTATION COMPANY et al., Appellants.
No. 99094.
Oct. 20, 2005.

Gail G. Renshaw, Marc W. Parker and Roy C. Dripps, of The Lakin Law Firm, P.C., Wood River, for appellee.

Justice KARMEIER delivered the opinion of the court:

Plaintiff filed suit against defendants in St. Clair County for injuries suffered while working as a seaman aboard a harbor boat. He claimed negligence under the Jones Act (46 U.S.C. app. § 688 *et seq.* (2000)), unseaworthiness, and maintenance and cure. Defendants filed a timely request for a jury trial, which was stricken by the trial court on plaintiff's motion, citing the Fifth District opinion in *Allen v. Norman Brothers, Inc.*, 286 Ill.App.3d 1091, 222 Ill.Dec. 705, 678 N.E.2d 317 (1997), for the proposition that only plaintiffs in Jones Act cases can demand a jury trial. Following a bench trial in which defendants stipulated to liability, the trial court awarded certain damages to plaintiff, including a $325,000 judgment for pain, suffering, disability and disfigurement. Defendants appealed, and the appellate court affirmed in part, finding, *inter alia*, that the trial court did not err in its refusal to recognize defendant's right to trial by jury or in its award of "pain and suffering" damages. No. 5-03-0439 (unpublished order under Supreme Court Rule 23). We granted defendants leave to appeal. 177 Ill.2d R. 315.

Plaintiff's complaint specifically included claims: (1) under the Jones Act, an *in personam* action for seamen who suffer injury in the course of employment due to the negligence of their employer, the vessel owner, or crew members; (2) for unseaworthiness under general maritime law based on the vessel owner's duty to ensure that the vessel is reasonably fit to be at sea; and (3) for maintenance and cure under general maritime law, based on the vessel owner's obligation to provide food, lodging and medical services to a seaman injured while serving the ship. See *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441, 121 S.Ct. 993, 997, 148 L.Ed.2d 931, 937 (2001). The evidence presented at trial established, *inter alia*, the following. Plaintiff worked for defendant American River Transportation Company (ARTCO) as a deckhand. While laboring aboard a harbor boat on May 25, 2001, a defective cable broke apart, struck plaintiff's leg, and broke his right tibia, the bone extending from the knee to the ankle. Plaintiff underwent surgery which consisted of inserting a rod inside the broken bone to serve as an internal splint to maintain alignment of the bone while it healed. The rod was held in place with one screw below the knee and two above the ankle. The surgery was completed successfully, without any complications, and within six months, plaintiff's doctor released him to return to full-time heavy manual labor. Plaintiff then began working, and has since continued to work, in the drywall trade.

As to the issue of plaintiff's pain, suffering, disability and disfigurement, the evidence showed that the injury involved a significant amount of force and was incredibly painful. However, there was no dispute that, at the time of trial, plaintiff was no longer experiencing excruciating or constant pain. Rather, plaintiff can now work and engage

in whatever recreational activities he performed before his injury, including running, biking and swimming. Plaintiff did testify that sometimes his leg is sore after a full day of work or after playing sports, and thus he does experience moderate pain at times.

After the trial concluded, the court issued its judgment, awarding plaintiff $12,000 in past lost wages; $325,000 in pain, suffering, disability and disfigurement; $7,200 in maintenance and cure; and $7,200 in attorney fees. On appeal, the panel diminished the maintenance award from $7,200 to $3,300, and vacated the award of attorney fees in its entirety. However, as mentioned, the appellate court affirmed the remainder of the trial court's findings, specifically the "pain and suffering" award and the striking of defendants' jury demand. The panel rejected defendants' reliance on an opinion recently filed in the Fourth District, *Hutton v. Consolidated Grain & Barge Co.*, 341 Ill.App.3d 401, 276 Ill.Dec. 950, 795 N.E.2d 303 (2003), which directly conflicts with *Allen* and holds that both parties in a Jones Act case are entitled to demand trial by jury.

Thus, the appeal before us raises two issues: (1) whether the trial court erred in striking defendants' jury demand in this state court Jones Act case; and (2) whether the $325,000 judgment for pain, suffering, disability and disfigurement is supported by the evidence. We find the dispositive issue to be whether, pursuant to the Jones Act, a defendant may demand a jury trial in a case filed in this state, or whether that right is reserved solely for the plaintiff. As this issue involves the construction of a statute, it is a question of law, and our standard of review is *de novo. Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill.2d 121, 128,

293 Ill.Dec. 677, 828 N.E.2d 1175 (2005); *People v. Robinson*, 172 Ill.2d 452, 457, 217 Ill.Dec. 729, 667 N.E.2d 1305 (1996). We further note that the cardinal rule of statutory construction is to ascertain and give effect to the true intent and meaning of the legislature. *Progressive Universal Insurance*, 215 Ill.2d at 134, 293 Ill.Dec. 677, 828 N.E.2d 1175; *People ex rel. Birkett v. City of Chicago*, 202 Ill.2d 36, 45, 269 Ill.Dec. 21, 779 N.E.2d 875 (2002). Thus, before determining the proper construction of the Jones Act provision at issue, we believe it helpful to understand the historical background of this federal legislation and its place in maritime law.

"Article III, § 2, of the United States Constitution vests federal courts with jurisdiction over all cases of admiralty and maritime jurisdiction. Section 9 of the Judiciary Act of 1789 codified this grant of exclusive original jurisdiction, but 'sav[ed] to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.' Ch. 20, § 9, 1 Stat. 77." *Lewis*, 531 U.S. at 443, 121 S.Ct. at 998, 148 L.Ed.2d at 939. That jurisdictional statute now states, with its substance largely unchanged, that "'[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*' 28 U.S.C. § 1333(1) (emphasis added)." *Lewis*, 531 U.S. at 443-44, 121 S.Ct. at 998-99, 148 L.Ed.2d at 939. Thus, the federal "saving to suitors" clause preserves remedies and the concurrent jurisdiction of state courts over some admiralty and maritime claims. *Lewis*, 531 U.S. at 445, 121 S.Ct. at 999, 148 L.Ed.2d at 940.

In 1903, the United States Supreme Court issued its opinion in *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903), which halted negligence suits by seamen, and allowed only claims based on maintenance and cure, and unseaworthiness of the vessel to proceed. In 1915, Congress, believing that seamen needed a negligence remedy, responded to the *Osceola* decision by enacting section 20 of the Act to Promote the Welfare of American Seamen (ch. 153, 38 Stat. 1164, 1185 (1915)). However, the language of the 1915 statute did not have the intended effect, and in 1920 Congress enacted the present Jones Act, which provides, in pertinent part, as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * * ." 46 U.S.C. app. § 688(a) (1988).

The railway employees' statutes referred to above comprise the Federal Employer's Liability Act (FELA) (45 U.S.C. §§ 51 through 60 (2000)), which offers, *inter alia*, a negligence remedy for certain railway workers against their employers. FELA was incorporated by reference into the Jones Act. See 45 U.S.C. §§ 51 through 60 (2000).

In *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924), the United States Supreme Court rejected a claim that the Jones Act was unconstitutional, and held that its essential features are as follows: (1) an injured seaman can pursue the FELA-based negligence remedy in admiralty court; (2) alternatively, he can

choose to sue on the law side of federal court on the basis of the Jones Act's language and the general grant of federal question jurisdiction; (3) when the seaman chooses the federal question/law side route, he is deemed to have invoked the permission granted by the general saving to suitors clause to bring a maritime case in a common law court; (4) the applicability of the saving to suitors clause to Jones Act federal question/law side suits entails the conclusion that Jones Act suits can also be maintained in state courts, and in federal court based on diversity jurisdiction; and (5) Jones Act cases are characterized as admiralty cases when they are maintained in federal court on the basis of admiralty jurisdiction. *Johnson*, 264 U.S. at 382-85, 388, 391, 44 S.Ct. at 392, 394, 395, 68 L.Ed. at 751-52, 753, 754; D. Robertson & M. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*, 30 J. Mar. L. & Com. 649, 657-58 (1999). When Jones Act cases are brought on any other jurisdictional basis, whether in state court or on the law side of federal court, they, like other saving-clause cases, are deemed to be cases at common law. *Johnson*, 264 U.S. at 382, 388, 391, 44 S.Ct. at 392, 394, 395, 68 L.Ed. at 751, 753, 754-55. With this background in mind, we now examine the Jones Act's language for assistance in deciding the issue before us.

As stated earlier, the primary rule of statutory construction is to ascertain and give effect to the legislature's intent. *Progressive Universal Insurance*, 215 Ill.2d at 134, 293 Ill.Dec. 677, 828 N.E.2d 1175; *People ex rel. Birkett*, 202 Ill.2d at 45, 269 Ill.Dec. 21, 779 N.E.2d 875. "We determine legislative intent by examining the language of the statute, which is 'the most reliable indicator of the legislature's objectives in enacting a particular law.'" *In re*

Detention of Lieberman, 201 Ill.2d 300, 308, 267 Ill.Dec. 81, 776 N.E.2d 218 (2002), quoting *Michigan Avenue National Bank v. County of Cook*, 191 Ill.2d 493, 504, 247 Ill.Dec. 473, 732 N.E.2d 528 (2000); see also *Hutton*, 341 Ill.App.3d at 406, 276 Ill.Dec. 950, 795 N.E.2d 303. Further, when undertaking the interpretation of a statute, we must presume that, when the legislature enacted a law, it did not intend to produce absurd, inconvenient or unjust results. *Progressive Universal Insurance*, 215 Ill.2d at 134, 293 Ill.Dec. 677, 828 N.E.2d 1175.

The key sentence of the Jones Act at issue here states: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury" (46 U.S.C.App. § 688(a) (2000)). We believe that anyone well versed in statutory construction, or even English grammar, would find the plain language of that sentence clearly states that the "election" to be made by the seaman pertains to his choice to maintain an action "at law," and not his election of a "right of trial by jury." Under the principle of statutory construction known as the last antecedent doctrine, relative or qualifying words or phrases in a statute serve only to modify words or phrases which are immediately preceding and do not modify those which are more remote. *People v. Davis*, 199 Ill.2d 130, 138, 262 Ill.Dec. 721, 766 N.E.2d 641 (2002); *McMahan v. Industrial Comm'n*, 183 Ill.2d 499, 511-12, 234 Ill.Dec. 205, 702 N.E.2d 545 (1998); *In re Application for Judgment & Sale of Delinquent Properties for the Tax Year 1989*, 167 Ill.2d 161, 169, 212 Ill.Dec. 215, 656 N.E.2d 1049 (1995); *Hutton*, 341 Ill.App.3d at 406, 276 Ill.Dec. 950, 795 N.E.2d 303.

In *Davis*, this court explained that in addition to the last antecedent doctrine, the doctrine of *ejusdem generis* is used to interpret statutes by providing that "when a statutory clause specifically describes several classes of persons or things and then includes 'other persons or things,' the word 'other' is interpreted as meaning 'other such like.'" *Davis*, 199 Ill.2d at 138, 262 Ill.Dec. 721, 766 N.E.2d 641, quoting *Farley v. Marion Power Shovel Co.*, 60 Ill.2d 432, 436, 328 N.E.2d 318 (1975). Thus, in determining whether a pellet/BB gun was a dangerous weapon within the meaning of the armed violence statute, the *Davis* court reasoned as follows:

> "[W]hen defining category I weapons, the armed violence statute begins by specifically listing firearm-type weapons by various commonly recognized names, followed by the clause, 'any other firearm.' The definition then goes on to specifically include 'sawed-off shotgun, a stun gun or taser as defined in paragraph (a) of Section 24-1 of this Code, knife with a blade of at least 3 inches in length, dagger, dirk, switchblade knife, stiletto.' The concluding phrase, 'any other deadly or dangerous weapon or instrument of like nature,' comes at the end of the list of blade-type weapons. Applying the doctrine of *ejusdem generis* in conjunction with the last antecedent rule, we find that the phrase 'any other deadly or dangerous weapon or instrument of like nature' was intended to refer only to weapons or instruments 'such like' the class of blade-type weapons which immediately preceded the clause in the provision, *i.e.*, weapons or instrument that are sharp and have the ability to cut or stab. We do not believe that the clause 'any other deadly or dangerous weapon or instrument of like nature' was intended to modify all of the named weapons

> and, thus, was not intended to include BB guns, pellet guns, paint ball guns or any other weapons, which are not firearms, but are *of like nature* to firearms." (Emphasis in original.) *Davis*, 199 Ill.2d at 138-39, 262 Ill.Dec. 721, 766 N.E.2d 641, quoting 720 ILCS 5/33A-1 (West 1992).

In the case before us, the language of the Jones Act is more straightforward and thus more easily interpreted than in *Davis*. "The Jones Act does not explicitly state only the plaintiff may elect a trial by jury. This [construction] would be true if the 'election' referred to in the statute was the election of trial by jury." *Hutton*, 341 Ill.App.3d at 406, 276 Ill.Dec. 950, 795 N.E.2d 303, quoting 46 U.S.C. app. § 688(a) (2000). Rather, under the last antecedent doctrine, the phrase "'at his election'" modifies "'may * * * maintain an action for damages at law,'" because the phrase "'with the right of trial by jury,'" is separated from the modifying phrase "'at his election'" by "'maintain an action for damages at law.'" *Hutton*, 341 Ill.App.3d at 406, 276 Ill.Dec. 950, 795 N.E.2d 303, quoting 46 U.S.C. app. § 688(a) (2000). Therefore, the rules of statutory construction clearly establish that the "election" referred to in the Jones Act is *not* the seaman's election of a trial by jury, but his election to proceed "at law" rather than in admiralty. See *Hutton*, 341 Ill.App.3d at 406, 276 Ill.Dec. 950, 795 N.E.2d 303.

Plaintiff argues that the Fifth District herein and in *Allen*, and not the Fourth District in *Hutton*, correctly interpret the plain meaning of this section of the Jones Act, which is to provide only the plaintiff with a right to elect between a bench trial and a trial by jury. No. 5-03-0439 (unpublished order under Supreme Court Rule 23), citing *Allen*, 286 Ill.App.3d at 1094, 222 Ill.Dec. 705, 678

N.E.2d 317. However, we find that, in addition to our reading of the plain language of the Jones Act, which is supported by the rules of statutory construction, a close inspection of the case law also leads to the conclusion that it is *Hutton* which correctly interprets the statute's meaning.

Hutton relies in part on the United States Supreme Court's decision in *Johnson*, 264 U.S. at 388, 44 S.Ct. at 394, 68 L.Ed. at 753, which held, *inter alia*, that the Jones Act gave seamen the substantive election between two "alternatives accorded by the maritime law." The statute "brings into [general maritime] law new rules, drawn from another system, and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules, or that provided by the new rules." *Johnson*, 264 U.S. at 388, 44 S.Ct. at 394, 68 L.Ed. at 753. *Hutton* further cites *Panama R.R. Co. v. Vasquez*, 271 U.S. 557, 560, 46 S.Ct. 596, 597, 70 L.Ed. 1085, 1087 (1926), wherein the United States Supreme Court stated that "the procedural provisions [of the Jones Act] have been construed * * * to mean that the new substantive rights may be asserted and enforced either in actions *in personam* against the employers in courts administering common-law remedies, with a right of trial by jury, or in suits in admiralty * * * without trial by jury." Thus, we agree with the *Hutton* court that *Vasquez* and *Johnson* hold these "new substantive rights" created by the Jones Act consist solely of a "new" maritime remedy whereby a seaman may choose to sue in negligence, and the right to file that suit either: (1) at law, with the attendant right to a trial by jury; or (2) in admiralty, where there is no right to trial by jury. See *Hutton*, 341 Ill.App.3d at 407, 276 Ill.Dec. 950, 795 N.E.2d 303.

We note that plaintiff also cites the decision in *Johnson* as supportive of his belief that the Jones Act provides a plaintiff with the sole right to demand a jury in an action at common law. However, instead of looking at *Johnson* in its entirety, plaintiff concentrates on one paragraph of the opinion and interprets it completely out of context. The portion of *Johnson* to which plaintiff points states:

> "A further objection urged against the statute is that it conflicts with the due process of law clause of the Fifth Amendment in that it permits injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers, and therefore is unreasonably discriminatory and purely arbitrary. * * * Of course the objection must fail. There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it never has been held, nor thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought." *Johnson*, 264 U.S. at 392-93, 44 S.Ct. at 396, 68 L.Ed. at 755.

This paragraph in *Johnson* includes, *inter alia*, the following propositions: (1) the Jones Act gives the plaintiff a choice between "varying" or "alternative measures of redress", and (2) the Act gives the plaintiff a choice between "different forms of action" or "alternative * * * modes of enforcement." *Johnson*, 264 U.S. at 392-93, 44

S.Ct. at 396, 68 L.Ed. at 755; D. Robertson & M. Sturley, *Understanding Panama R.R. Co. v. Johnson: The Supreme Court's Interpretation of the Seaman's Elections Under the Jones Act*, 14 U.S.F. Mar. L.J. 229, 245 (2001-02). There appears to be no debate that the terms "varying" or "alternative measures of redress" refer to *The Osceola* remedies of unseaworthiness and maintenance and cure, versus the "new" negligence action. See 14 U.S.F. Mar. L.J. at 245. However, the key disagreement between plaintiff and defendant herein relates to the second proposition. "What did the Court mean by saying that the Jones Act gives the plaintiff a choice between alternative 'forms of action' ('modes of enforcement')?" 14 U.S.F. Mar. L.J. at 245. Plaintiff argues that these terms refer to a jury trial versus a nonjury trial, whereas defendants argue the terms refer instead to the plaintiff's election between bringing a Jones Act suit in admiralty or on the law side. We agree with defendants.

As earlier noted, any search for the meaning of this paragraph in *Johnson*, and particularly the meaning of the term "forms of action" and "modes of enforcement" as used therein, must begin by placing the paragraph in context with the rest of the Court's opinion. *Johnson*, 264 U.S. at 392-93, 44 S.Ct. at 396, 68 L.Ed. at 755. The *Johnson* Court's primary objective was to determine the constitutionality of the Jones Act. In doing so, *Johnson* clearly explained that the Act's purpose was not to remove the negligence right of action from admiralty jurisdiction and make it cognizable only on the common law side of the courts, which would indeed raise constitutionality questions, but rather "the terms of the statute in this regard are not imperative but permissive." *Johnson*, 264 U.S. at 389-91, 44 S.Ct. at 395, 68 L.Ed. at 754. "[The Jones Act]

says 'may maintain' an action at law 'with the right of trial by jury,' the import of which is that the injured seaman is permitted, but not required, to proceed on the common-law side of the court *with a trial by jury as an incident.*" (Emphasis added.) *Johnson*, 264 U.S. at 390-91, 44 S.Ct. at 395, 68 L.Ed. at 754, quoting 46 U.S.C. app. § 688(a). The Court further found that, under this view, the Jones Act leaves the injured seaman free "under the general law * * * of the Judicial Code" to assert his right of action under the new rules on the admiralty side of the court, where the issues will be tried by the court, or on the common-law side, where there will be a right of trial by jury. *Johnson*, 264 U.S. at 391, 44 S.Ct. at 395, 68 L.Ed. at 755.

Thus, examining *Johnson* in its entirety shows that the "forms of action" choice discussed in the paragraph cited by plaintiff refers to admiralty actions versus at-law negligence actions. We can find nothing in the *Johnson* opinion which suggests that the term "forms of action" could have been intended to refer to a choice between jury and nonjury trials in common law actions. Indeed, the jury trial is explicitly referred to "as an incident" of the choice "to proceed on the common law side of the court." *Johnson*, 264 U.S. at 391, 44 S.Ct. at 395, 68 L.Ed. at 754; see 14 U.S.F. Mar. L.J. at 251. We therefore conclude that *Johnson* does not support plaintiff's view that the Jones Act gave to plaintiffs the unilateral right to elect the form of trial, *i.e.*, jury or nonjury, in an action at law.

This conclusion, however, does not negate the fact that, under the Jones Act, a plaintiff *does* control the choice between a bench or jury trial by using his choice of the forum. That is, the plaintiff desiring a bench trial may bring his case in admiralty under 28 U.S.C. § 1333, as

there, neither party is entitled to a jury trial. See 30 J. Mar. L. & Com. at 669. On the other hand, the plaintiff desiring a jury trial may bring his case, pursuant to the saving-to-suitors clause, on the law side of federal court or in a state court whose law guarantees the right to a jury trial. See 30 J. Mar. L. & Com. at 669-70. Thus, having the power to control the forum, the Jones Act plaintiff starts out with full control over whether the case will be tried to a jury. It is in this sense that statements to the effect that "the Jones Act gives only the plaintiff the right to choose a jury trial" are true. However, *Johnson* and its predecessor in the Second Circuit make it clear that once the Jones Act plaintiff has made his forum choice, if defendants in that forum normally have a right to a jury, then so does the Jones Act defendant. See 30 J. Mar. L. & Com. at 670, citing *Johnson*, 264 U.S. at 391, 44 S.Ct. at 395, 68 L.Ed. at 754; *Panama R.R. Co. v. Johnson*, 289 F. 964 (2d Cir.1923), *aff'd*, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924).

Given the foregoing, we agree with defendants that *Hutton* correctly found the Jones Act did not express an intention by Congress to dictate the method of trial in state court. "Based on our construction of the statute, we conclude the Jones Act does not limit the right to trial by jury to the plaintiff only." *Hutton*, 341 Ill.App.3d at 407, 276 Ill.Dec. 950, 795 N.E.2d 303. However, plaintiff argues that the *Hutton* court's decision is contrary to the overwhelming weight of both federal and Illinois case law. See *Allen v. Norman Brothers, Inc.*, 286 Ill.App.3d 1091, 222 Ill.Dec. 705, 678 N.E.2d 317 (1997); see also *Hanks v. Luhr Brothers,- Inc.*, 303 Ill.App.3d 661, 236 Ill.Dec. 696, 707 N.E.2d 1266 (1999); *Hearn v. American River Transportation Co.*, 303 Ill.App.3d 619, 236 Ill.Dec. 713, 707 N.E.2d

1283 (1999); *Gibbs v. Lewis & Clark Marine, Inc.*, 298 Ill.App.3d 743, 233 Ill.Dec. 126, 700 N.E.2d 227 (1998); *Craig v. Atlantic Richfield Co.*, 19 F.3d 472 (9th Cir.1994); *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480 (5th Cir.1992); *Rachal v. Ingram Corp.*, 795 F.2d 1210 (5th Cir.1986). Plaintiff further argues that because federal court decisions interpreting a federal act are binding upon Illinois courts, it was improper for the appellate court in *Hutton* to interpret a federal statute contrary to interpretations made by federal appellate courts. See *Hutton*, 341 Ill.App.3d at 408, 276 Ill.Dec. 950, 795 N.E.2d 303 (Myerscough, P.J., dissenting), citing *Sundance Homes, Inc. v. County of Du Page*, 195 Ill.2d 257, 276, 253 Ill.Dec. 806, 746 N.E.2d 254 (2001).

We acknowledge that in *Rachal*, 795 F.2d at 1215, the federal district court held that the "Jones Act gives only the seaman-plaintiff the right to choose a jury trial," and in *Craig*, 19 F.3d at 476, the court found "[t]he plain language of the Jones Act gives a *plaintiff* the option of maintaining an action at law with the accompanying right to a jury trial * * * [and] makes no mention of a defendant." (Emphasis in original.) Further, in *Linton*, 964 F.2d at 1490, the court held that "the Jones Act allows the injured seaman to elect a non-jury trial 'at law' in a state court." Based upon these federal court decisions, the Fifth District in *Allen* and its above-stated progeny established the same precedent in Illinois. However, this court has now stated its agreement with the *Hutton* opinion and, in

turn, its disagreement with *Rachal* and the line of cases which has furthered its reasoning.[1]

Further, we reject plaintiff's claim that we are bound by federal court decisions on this issue. While in *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill.2d 369, 383, 240 Ill.Dec. 691, 718 N.E.2d 172 (1999), this court stated "federal decisions are considered controlling on Illinois state courts interpreting a federal statute" because federal statutes must be given uniform application, six months later, in *Weiland v. Telectronics Pacing Systems, Inc.*, 188 Ill.2d 415, 423, 242 Ill.Dec. 618, 721 N.E.2d 1149 (1999), this court held that it need not follow Seventh Circuit precedent for three reasons – the United States Supreme Court had not ruled on the issue, there was a split of authority among the federal circuit courts of appeals, and this court believed that the Seventh Circuit case was wrongly decided. Later, in *Sprietsma v. Mercury Marine*, 197 Ill.2d 112, 258 Ill.Dec. 690, 757 N.E.2d 75 (2001), *reversed on other grounds*, 537 U.S. 51, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002), this court attempted to reconcile the *Wilson* and *Weiland* decisions, stating:

> "[A]s we have repeatedly recognized, uniformity of decision is an important consideration when state courts interpret federal statutes. [Citations.] * * * In the absence of a decision of the United States Supreme Court, which would definitively answer the question presented by this case, we elect to give considerable weight to the decisions of federal courts of appeals and federal

[1] See 30 J. Mar. L. & Com. at 659-67 (for a well-reasoned discussion of *Rachal*, its history, and the way it and its progeny came to their erroneous conclusions).

> district courts that have addressed this issue." *Sprietsma*, 197 Ill.2d at 120, 258 Ill.Dec. 690, 757 N.E.2d 75.

Accordingly, while a decision of the United States Supreme Court is binding on this court, federal circuit and district court decisions were recognized in *Sprietsma* as merely being persuasive. See *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill.App.3d 828, 835, 283 Ill.Dec. 324, 807 N.E.2d 1165 (2004). Further, in *Bishop v. Burgard*, 198 Ill.2d 495, 507, 261 Ill.Dec. 733, 764 N.E.2d 24 (2002), this court held that federal circuit courts of appeals exercise no appellate jurisdiction over the Illinois Supreme Court, and that we need not follow their precedent where the United States Supreme Court has not yet answered the precise question. Here, therefore, where the Supreme Court has not yet ruled upon the question presented, *i.e.*, whether a defendant in a state common law Jones Act case is entitled to demand a trial by jury, we are not bound by the holding in *Rachal* or any federal or circuit court rulings on this issue. Rather, based on our own construction of the statute and cases such as *Johnson* and *Hutton* which have interpreted it, we hold that the Jones Act does not give an exclusive right to the plaintiff to elect a trial by jury in an action filed in state court. *Allen* and its Fifth District progeny, *Hanks, Hearn*, and *Gibbs*, are therefore overruled on this point.

Plaintiff's next argument is that federal substantive law, rather than state procedural law, governs the right to a jury trial in a common law Jones Act case filed in state court. Plaintiff relies mainly on *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363, 72 S.Ct. 312, 315, 96 L.Ed. 398, 404 (1952), wherein the Supreme Court asserted that "the right to trial by jury is too substantial a

part of the rights accorded by [FELA] to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used. [Citation.]" It is true that because the Jones Act incorporates FELA by reference, FELA decisions are persuasive authority on the meaning of the Jones Act. See, *e.g., Kernan v. American Dredging Co.*, 355 U.S. 426, 439, 78 S.Ct. 394, 401, 2 L.Ed.2d 382, 392 (1958). We, nevertheless, do not believe that *Dice* resolves the question here.

Even if, *arguendo*, we agreed that *Dice* should extend to the Jones Act context, *Dice* does not suggest that the plaintiff's "substantial" right to a jury trial would also include the disputed right under *Rachal* to insist upon a nonjury trial. See *Dice*, 342 U.S. at 365, 72 S.Ct. at 316, 96 L.Ed. at 405 (Frankfurter, J., concurring in part and dissenting in part, joined by Reed, Jackson and Burton, JJ.) (a state may not "discriminate disadvantageously against actions for negligence under the [FELA] as compared with local causes of action in negligence. [Citations.] Conversely * * * a state is under no duty to treat actions arising under [FELA] differently from the way it adjudicates local actions for negligence, so far as the mechanics of litigation, the forms in which law is administered, are concerned"). "In other words, even if one believed that the Jones Act forbids the states from denying plaintiffs (and even defendants) the right to a jury trial, there would still be no basis for concluding that the Jones Act guarantees plaintiffs a state-court bench trial by forbidding the states from extending to defendants the jury-trial rights that would otherwise exist." 14 U.S.F. Mar. L.J. at 263. Thus, we find no reason to rely on *Dice* and the other FELA cases regarding the type of law governing the right to a jury trial in state Jones Act cases. See generally *Cox v. Roth*,

348 U.S. 207, 209, 75 S.Ct. 242, 243-44, 99 L.Ed. 260, 263 (1955) (in Jones Act cases, the courts are not bound to follow FELA itself, let alone a decision construing FELA, when its application appears unreasonable).

As simply stated in *Hutton*: "Procedural rules in a Jones Act claim are governed by the forum in which the claim is filed." *Hutton*, 341 Ill.App.3d at 407, 276 Ill.Dec. 950, 795 N.E.2d 303. Indeed, even *Linton* held that if the plaintiff elects to proceed with his Jones Act case "at law" in state court, "'whether he, *or the defendant*, would have a right to trial by jury would depend on state civil procedure.'" (Emphasis added.) *Linton*, 964 F.2d at 1487, quoting *Pellegrin v. International Independent Towing*, No. 88-5255, slip op. at 3-4 (E.D.La. March 6, 1989). This conclusion, we believe, is also the broad message of the Supreme Court's decision in *American Dredging Co. v. Miller*, 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994), where, in deciding the treatment of venue under the Jones Act, the Court quoted *Bainbridge v. Merchants' & Miners' Transportation Co.*, 287 U.S. 278, 280-81, 53 S.Ct. 159, 159-60, 77 L.Ed. 302, 304-05 (1932), for the proposition that "although 46 U.S.C.App. § 688(a) contains a venue provision, 'venue [in Jones Act cases brought in state court] should . . . [be] determined by the trial court in accordance with the law of the state.'" *American Dredging Co. v. Miller*, 510 U.S. 443, 457, 114 S.Ct. 981, 990, 127 L.Ed.2d 285, 299 (1994). Thus, in *American Dredging Co.*, as here, the characterization of a state rule as substantive or procedural is a good indicator of whether federal preemption exists. See *American Dredging Co.*, 510 U.S. at 457-58, 114 S.Ct. at 990, 127 L.Ed.2d at 300 (Souter, J., concurring). We therefore hold that the availability of a

jury trial in Jones Act cases is a question that is properly controlled by the normal laws of the forum.

Having found that the right to try a Jones Act case in state court is indeed a matter of state law, we must now determine under what authority defendants herein may claim this right. Plaintiff contends that no authority exists under *Illinois* law providing defendants in this common law Jones Act case with a trial by jury, and that the lower courts were therefore correct in rejecting defendants' demand for a jury trial. We begin by stating our agreement with plaintiff that section 2-1105 of the Code of Civil Procedure (735 ILCS 5/2-1105 (West 2000)) does not, as the *Hutton* majority reasoned, establish a Jones Act defendant's *right* to a state jury trial. Rather, that section states: "A defendant desirous of a trial by jury must file a demand therefor not later than the filing of his or her answer." 735 ILCS 5/2-1105(a) (West 2000). Thus, this section of the Code of Civil Procedure merely provides the process by which a party may advise the court of its desire for a jury trial (*Roszell v. Gniadek*, 348 Ill.App. 341, 343-44, 109 N.E.2d 222 (1952)), and says nothing about whether a party is entitled to a jury trial in any given action. *Hutton*, 341 Ill.App.3d at 409, 276 Ill.Dec. 950, 795 N.E.2d 303 (Myerscough, P.J., dissenting). However, we also agree with defendants that the right to a jury trial *is* guaranteed to Jones Act defendants through our state constitution.

Article I, section 13, of the Illinois Constitution of 1970 provides: "The right of trial by jury as heretofore enjoyed shall remain inviolate." Ill. Const.1970, art. I, § 13. The Illinois Constitution of 1870 first employed the phrase "as heretofore enjoyed" when speaking of the inviolate right of trial by jury. Ill. Const. 1870, art. II, § 5;

People ex rel. Daley v. Joyce, 126 Ill.2d 209, 213-14, 127 Ill.Dec. 791, 533 N.E.2d 873 (1988). Under this provision, parties to a civil case are entitled to a jury trial when that right existed at common law. *Martin v. Heinold Commodities, Inc.*, 163 Ill.2d 33, 72, 205 Ill.Dec. 443, 643 N.E.2d 734 (1994); see also *Research Hospital v. Continental Illinois Bank & Trust Co.*, 352 Ill. 510, 521, 186 N.E. 170 (1933) ("The right to a jury trial 'as heretofore enjoyed,' secured by our constitution, is a jury trial in those tribunals which exercise common law jurisdiction"). In other words, Illinois courts have construed the Illinois constitutional guarantee of a right to trial by jury as adhering to those actions known at common law at the time the "as heretofore enjoyed" language was adopted. See *People ex rel. O'Malley v. 6323 North LaCrosse Avenue*, 158 Ill.2d 453, 457, 199 Ill.Dec. 690, 634 N.E.2d 743 (1994); *Joyce*, 126 Ill.2d at 215, 127 Ill.Dec. 791, 533 N.E.2d 873.

We note that there is some debate between the parties as to whether the 1870 or the 1970 constitution is the pertinent time frame for this determination. However, we need not decide this question definitively here, as our research reveals that injured seamen were trying their common law negligence cases to juries in Illinois long before the Jones Act was adopted in 1920, and even before the "as heretofore enjoyed" language was first adopted in the constitution of 1870. See, *e.g.*, *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N.E. 241 (1894); *Schooner "Norway" v. Jensen*, 52 Ill. 373 (1869). Thus, by including the phrase "as heretofore enjoyed" in the jury clause of both the Illinois constitutions of 1870 and 1970, the framers must have intended to incorporate the practice of jury trials for injured seamen which Illinois had employed in the years prior to the adoption of those constitutions. See

Joyce, 126 Ill.2d at 221, 127 Ill.Dec. 791, 533 N.E.2d 873 ("At the time of the insertion of 'as heretofore enjoyed,' it would seem logical to believe that the drafters of the 1870 constitution, by that insertion, referred to the nearly 100 years of trial by jury experience that the people of this State and territory had enjoyed").

Finally, plaintiff argues that, irrespective of whether suits by injured seamen were tried to juries before our constitution adopted the "as heretofore enjoyed" language, the Jones Act is a "new cause of action" and a statutory proceeding unknown to the common law. Therefore, plaintiff contends claims filed under the Act are without a right to trial by jury in Illinois courts. For this proposition, plaintiff cites, *inter alia*, *Martin*, 163 Ill.2d at 76, 205 Ill.Dec. 443, 643 N.E.2d 734 (because the Consumer Fraud Act is a statutory proceeding unknown to the common law, our constitution does not confer the right to a jury trial for a claim made under the Act), and *Brown v. C.D. Mallory & Co.*, 122 F.2d 98, 101 (3d Cir.1941) (the Jones Act in effect created a "new cause of action" at law (as distinguished from admiralty) for seamen with personal injuries arising by reason of the employer's negligence as distinguished from the causes of action of ancient origin which arose from defective equipment or an unseaworthy vessel). We agree with defendants that this argument is without merit.

The Supreme Court's decision in *The Osceola*, which temporarily halted suits by seamen based on negligence, does not alter the fact that such suits were indeed tried to juries and were "heretofore enjoyed" in pre-*Osceola* days. Indeed, plaintiff's characterization of the Jones Act as creating a new cause of action contradicts Supreme Court cases which have recognized that the Jones Act simply

removed the bar to common law suits that *The Osceola* had created, and allowed seamen to invoke common law principles like other tort victims. See *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 354, 111 S.Ct. 807, 817, 112 L.Ed.2d 866, 881-82 (1991); *Panama R.R. Co. v. Vasquez*, 271 U.S. 557, 561, 46 S.Ct. 596, 597, 70 L.Ed. 1085, 1087-88 (1926) ("an action *in personam* to recover damages for tort is one of the most familiar of the common-law remedies, and it is such a remedy at law that is contemplated by [the Jones Act] and invoked in this case"). Thus, while the Jones Act is a statute, its purpose was to reestablish the long-standing common law right of seamen to sue for negligence which *The Osceola* had taken away. As defendants aptly state, "the essence of a Jones Act suit is still common law negligence, which has always been the subject of jury trials in Illinois." We therefore conclude that Jones Act defendants litigating in Illinois courts have the right to a trial by jury under our state constitution. This decision makes it unnecessary to address defendants' additional argument that the appellate court's interpretation of the Jones Act creates constitutional problems such as the right to equal protection under the law. *In re Barbara H.*, 183 Ill.2d 482, 492, 234 Ill.Dec. 215, 702 N.E.2d 555 (1998) (if a case may be decided on other grounds, the constitutionality of a statute should not be addressed). However, we agree with professors Robertson and Sturley who, in responding to arguments made by Jones Act plaintiffs in defending similar claims, stated:

> "It is nothing short of astonishing to suggest that – in a forum in which jury trials are generally available at the request of either party – one party would have a unilateral right to choose between a jury and a bench trial. Such a unilateral right would be unprecedented in law * * * and

contrary to basic notions of even-handed procedural fairness." 14 U.S.F. Mar. L.J. at 268.

Because we have now held that neither the language of the Jones Act, nor case law interpreting it, nor Illinois law prevent a defendant in a common law action under that statute to demand a jury trial in this state, it is clear that the lower courts herein erred in denying defendants' motion seeking a jury trial on plaintiff's negligence claim. Defendants are additionally entitled to a jury trial on the unseaworthiness and maintenance and cure counts of plaintiff's complaint. See *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 21, 83 S.Ct. 1646, 1650, 10 L.Ed.2d 720, 725 (1963) (because the jury is the only tribunal competent to try all types of maritime cases, a maintenance and cure claim joined with a Jones Act claim must be submitted to the jury when both arise out of one set of facts). Given these findings and the necessity that a new trial be held with a jury, it is unnecessary to address the question of whether the pain, suffering, disability and disfigurement damages awarded to plaintiff were excessive.

For the foregoing reasons, the judgments of both the appellate court and the circuit court are reversed, and the cause is remanded to the circuit court for a trial by jury.

Judgments reversed; cause remanded.

Justice KILBRIDE, specially concurring:

I agree with the result reached by the majority and with its analysis except for the reasoning concerning whether Illinois law provides Jones Act defendants with a right to trial by jury. I believe that other authority clearly exists supporting the existence of that right and, therefore, I write separately to explain my view.

The majority has correctly concluded that "the availability of a jury trial in Jones Act cases is a question that is properly controlled by the normal laws of the forum." 217 Ill.2d at 94, ___ Ill.Dec. ___, ___ N.E.2d ___. The opinion, however, rejects the reasoning of the *Hutton* majority that section 2-1105 of the Code of Civil Procedure (Code) establishes a Jones Act defendant's right to trial by jury. Instead, the majority adopts the argument of dissenting Justice Myerscough and holds that this section "merely provides the process by which a party may advise the court of its desire for a jury trial [citation], and says nothing about whether a party is entitled to a jury trial in any given action." 217 Ill.2d at 95, ___ Ill. Dec. ___, ___ N.E.2d ___.

The plain language of section 2-1105 compels a contrary conclusion. The section provides in relevant part:

> "A defendant desirous of a trial by jury must file a demand therefor not later than the filing of his or her answer. Otherwise, the party waives a jury. * * * If the plaintiff files a jury demand and thereafter waives a jury, any defendant * * * shall be granted a jury trial upon demand therefor made promptly after being advised of the waiver * * * ." 735 ILCS 5/2-1105(a) (West 2000).

The waiver provision would, of course, be meaningless unless the right of any party to a jury trial exists. The section uses the mandatory term "shall" in commanding the grant of a jury trial to a defendant asserting that right following a waiver by the plaintiff or another defendant. All of the provisions in article 2 of the Code apply to matters of procedure not regulated by other statutes. 735 ILCS 5/1-108(b) (West 2000). Neither the Jones Act nor any other statute purports to regulate procedure for

demanding or waiving jury trial. Thus, section 2-1105 of the Code necessarily implies Jones Act defendants, like all tort litigants, have a right to a jury trial.

In *Stephens v. Kasten*, 383 Ill. 127, 48 N.E.2d 508 (1943), this court expressly recognized the right of defendants to a jury trial in a tort action seeking money damages. The court found an abuse of discretion in the trial court's failure to allow a late filing of a jury demand by defendants when good cause was shown for the delay, emphasizing the importance of protecting the "jealously guarded right of trial by jury." *Stephens*, 383 Ill. at 135, 48 N.E.2d 508. The court noted that the right to trial by jury has been guaranteed in Illinois since the state's organization and has been carried forward in each of our successive constitutions. *Stephens*, 383 Ill. at 132, 48 N.E.2d 508. The court accordingly reversed a substantial judgment for plaintiffs and remanded the cause for a new trial. *Stephens*, 383 Ill. at 135, 48 N.E.2d 508.

The *Stephens* court drew no distinction between a plaintiff's and a defendant's right to trial by jury, noting that section 5 of article II of the Illinois Constitution of 1870 "gives a *litigant* a right to a jury trial." (Emphasis added.) *Stephens*, 383 Ill. at 132, 48 N.E.2d 508. Hence, I conclude that absent an express provision in the Jones Act limiting the right of jury trial to plaintiffs, the right may be exercised by both plaintiffs and defendants, just as in other Illinois tort remedies, whether statutory or at common law. As the majority observes, common law negligence claims of injured seamen were tried by juries long before the adoption of the "as heretofore enjoyed" provision in the 1870 constitution. 217 Ill.2d at 95-96, ___ Ill. Dec. ___, ___ N.E.2d ___. There is no basis to conclude that Jones Act claims should be treated differently than

common law negligence actions in the application of section 2-1105 of the Code. Thus, I agree with the majority's holding, disagreeing only with a portion of its rationale.

NO. 5-03-0439

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DAVID W. BOWMAN, Plaintiff-Appellee, v. AMERICAN RIVER TRANSPORTATION COMPANY and ARCHER-DANIELS-MIDLAND COMPANY, Defendants-Appellants.	Appeal from the Circuit Court of St. Clair County. No. 01-L-416 Honorable Walter C. Brandon, Jr., Judge, presiding.

RULE 23 ORDER

(Filed Aug. 2, 2004)

The plaintiff, David W. Bowman, was seriously injured while working on a harbor boat under the employ of the defendants, American River Transportation Company and Archer-Daniels-Midland Company. He filed suit under the Jones Act (46 U.S.C. App. §688 (1994 & Supp. 1999)). The defendants appeal trial court orders striking their demand for a jury trial and awarding the plaintiff damages. They contend that (1) the Jones Act affords both plaintiffs and defendants a right to demand a jury trial, (2) the award of $325,000 for pain and suffering and disability and disfigurement was excessive in light of the evidence presented, (3) the plaintiff failed to prove that he incurred any living expenses and was thus not entitled to a maintenance award, and (4) the plaintiff was not entitled to

attorney fees. We affirm in part, reverse in part, and remand with directions.

I. BACKGROUND

On May 25, 2001, a wire on the boat on which the plaintiff was working broke and hit the back of the plaintiff's calf. The wire that struck the plaintiff's leg was nearly one inch in diameter and weighed 50 pounds. As a result of his injury, the plaintiff was taken by ambulance to St. Louis University Hospital, where an X ray of his left leg revealed multiple fractures to his left tibia and a fracture to his left fibula. He underwent an intermedullary procedure, which is a surgery to insert a metal rod into his bone to act as an internal splint. He also had a sprained right ankle, for which he was given an air cast.

While the plaintiff was in the hospital, he submitted to a drug test pursuant to the defendants' substance abuse policy, which requires employees to submit to a drug test after being involved in a workplace accident. The test came back positive for marijuana. As a result, the plaintiff received a letter terminating his employment on June 5, 2001.

On July 11, 2001, the plaintiff filed a petition seeking compensation for past and future lost wages, pain and suffering and disability and disfigurement, and maintenance and cure. "Maintenance" refers to reimbursement for an injured seaman's living costs incurred while recovering from an injury, while "cure" refers to reimbursement for his medical expenses. *McMillan v. Tug Jane A. Bouchard,* 885 F. Supp. 452, 459 (E.D. N.Y. 1995). The parties stipulated that the defendants paid the plaintiff's medical bills, so only payments for maintenance are at issue.

On September 10, 2001, the defendants filed an answer to the plaintiff's complaint, and the answer included a demand for a jury trial. On September 24, the plaintiff filed a motion to strike the defendants' jury demand, and the trial court granted the motion on October 17, 2001. The case proceeded to a bench trial on April 7, 2003.

On June 11, 2003, the trial court entered an order finding for the plaintiff. The court ordered the defendants to pay the plaintiff $12,000 for past lost wages, $325,000 for pain and suffering and disability and disfigurement, and $7,200 for maintenance and cure. The court expressly found that the defendants' failure to pay maintenance to the plaintiff during his convalescence was callous and unreasonable, and therefore it awarded the plaintiff $7,200 in attorney fees as well. On July 11, 2003, the defendants filed the instant appeal.

II. ANALYSIS

A. The Defendants' Jury Trial Demand

The defendants first contend that the trial erred in striking their request for a jury trial. In so arguing, they ask us to overrule our prior decision in *Allen v. Norman Brothers, Inc.*, 286 Ill. App. 3d 1091, 678 N.E.2d 317 (1997). In *Allen*, this court held that a defendant does not have the right to demand a jury trial pursuant to the Jones Act. *Allen*, 386 Ill. App. 3d at 1096, 678 N.E.2d at 321. Recently, a divided panel of the Fourth District Appellate Court held just the opposite. *Hutton v. Consolidated Grain & Barge Co.*, 341 Ill. App. 3d 401, 407, 795 N.E.2d 303, 308 (2003). Because we find that our reasoning in *Allen* was sound and our decision in accord with

federal cases construing the Jones Act, we decline to overrule it.

In *Allen,* we noted that the Jones Act, by its plain language, neither grants nor denies the defendants in a Jones Act proceeding the right to demand a trial by jury. *Allen,* 286 Ill. App. 3d at 1095, 678 N.E.2d at 320 (citing *Craig v. Atlantic Richfield Co.,* 19 F.3d 472, 476 (9th Cir. 1994)). Federal courts have repeatedly construed it to provide only the plaintiff with a right to elect between a bench trial and a trial by jury. *Allen,* 286 Ill. App. 3d at 1094, 678 N.E.2d at 319-20 (citing *Rachal v. Ingram Corp.,* 795 F.2d 1210, 1213 (5th Cir. 1986); *Craig,* 19 F.3d at 476)).

Although the Jones Act itself grants only plaintiffs the right to demand a jury trial, there are circumstances in which defendants also have this right. When an injured seaman files a Jones Act claim in federal court, the plaintiff may choose to either invoke the federal court's maritime jurisdiction or bring the suit as an action at law. See *Rachal,* 795 F.2d at 1213 (citing 28 U.S.C. §1333 (1982)). If the court's maritime jurisdiction is invoked, neither party has a right to demand a jury. *Hutton,* 341 Ill. App. 3d at 407, 795 N.E.2d at 308 (citing *Panama R.R. Co. v. Vasquez,* 271 U.S. 557, 560, 70 L. Ed. 1085, 1087, 46 S. Ct. 596, 597 (1926)). If the sole basis for the federal court's jurisdiction is the Jones Act (that is, if the requirements for diversity jurisdiction are not satisfied and the plaintiff does not seek the federal court's maritime jurisdiction), the plaintiff, but not the defendant, has a statutorily granted right to demand a jury trial. *Rachal,* 795 F.2d at 1213. If the requirements for federal diversity jurisdiction are met, either party may demand a jury trial by virtue of the

seventh amendment to the United States Constitution. *Rachal,* 795 F.2d at 1213.

A plaintiff may also choose to bring a Jones Act claim in state court. As this court pointed out in *Allen,* the seventh amendment does not apply to suits brought in state courts. *Allen,* 286 Ill. App. 3d at 1095, 678 N.E.2d at 320 (citing *Minneapolis & St. Louis R.R. Co. v. Bombolis,* 241 U.S. 211, 217, 60 L. Ed. 961, 963, 36 S. Ct. 595, 596 (1916)). Because neither the Jones Act nor the federal constitution provides a Jones Act defendant the right to demand a jury trial in a proceeding in a state court, it follows that the right exists only if provided by state law.

We note that the defendants argue that in *Allen* we incorrectly held that the right to a trial by jury is governed solely by federal law. There, having first concluded that neither the federal constitution nor the Illinois constitution provides a right to a trial by jury to Jones Act defendants, we observed that "the provisions of the statute govern whether and to what extent there is a right to a jury trial." *Allen,* 286 Ill. App. 3d at 1096, 678 N.E.2d at 320-21. To the extent this language is subject to the misinterpretation given to it by the defendants, we now clarify that the right to demand a jury trial must have some source, be it the federal constitution, the statute itself, or state law.

In *Allen,* the defendant argued that the Illinois Constitution provided such a right. See Ill. Const. 1970, art. I, §13. We rejected that argument, explaining that the right to a jury trial provided in the Illinois Constitution is less expansive than that provided in the seventh amendment. The seventh amendment has been interpreted by federal courts to extend to purely statutory causes of

action where the requirements for invoking federal diversity jurisdiction are satisfied. *Allen,* 286 Ill. App. 3d at 1095, 678 N.E.2d at 320; see also *Rachal,* 795 F.2d at 1213. Its Illinois counterpart, by contrast, does not provide a right to a jury trial for purely statutory causes of action that did not exist at common law. *Allen,* 286 Ill. App. 3d at 1095, 678 N.E.2d at 320 (citing *Martin v. Heinold Commodities, Inc.,* 163 Ill. 2d 33, 73, 643 N.E.2d 734, 753 (1994)). We concluded that because the common law provided no right to seamen to recover damages for injuries suffered as a result of a shipowner's negligence, the Jones Act created a purely statutory cause of action that did not exist at common law. *Allen,* 286 Ill. App. 3d at 1094, 678 N.E.2d at 319. The defendants ask us to reconsider our position. They argue that the cause of action allowed by the Jones Act is really no more than a statutory modification of the cause of action for negligence that has always existed at common law. We disagree. Simply put, the Jones Act granted a right that previously did not exist. Thus, the mere fact that it shares some common features with common law tort causes of action does not negate the fact that it is a separate cause of action.

We note that no Illinois courts have held that our state constitution provides a jury trial right to a Jones Act defendant. The *Hutton* court, which the defendants urge us to follow, is the only Illinois court to hold that a defendant has a right to demand a jury in a Jones Act proceeding. That court did not base its ruling on our state constitution, however. See *Hutton,* 341 Ill. App. 3d at 409, 795 N.E.2d at 310 (Myerscough, J., dissenting) ("[t]he majority opinion, while not expressly stating so, appears to agree that Jones Act claims did not exist at common law"). Rather, the court found a right for a Jones Act defendant

to seek a trial by jury under Illinois law pursuant to section 2-1105 of the Code of Civil Procedure (735 ILCS 5/2-1105 (West 2000)). *Hutton,* 341 Ill. App. 3d at 408, 795 N.E.2d at 309. Section 2-1105, however, provides only a *mechanism* by which either party may invoke its right to a trial by jury in an action in which the party has that right. The statute does not itself confer the right to demand a jury. See *Hutton,* 341 Ill. App. 3d at 409, 795 N.E.2d at 310 (Myerscough, J., dissenting); see also *Rachal,* 795 F.2d at 1215 (noting that Federal Rule of Civil Procedure 39 (Fed. R. Civ. P. 39) does not provide an independent right to seek a jury trial). We therefore find the *Hutton* court's rationale unpersuasive and decline to adopt it. Because we reaffirm our previous holding in *Allen,* we conclude that the trial court properly struck the defendants' demand for a jury trial.

B. Pain and Suffering and Disfigurement and Disability

The defendants acknowledge that the plaintiff is entitled to recover damages for pain and suffering and disfigurement and disability, but they contend that the evidence does not support an award as large as $325,000. There is no mathematical formula to determine a precise dollar amount that will fairly compensate a plaintiff for pain and suffering. *Hendricks v. Riverway Harbor Service St. Louis, Inc.,* 314 Ill. App. 3d 800, 810, 732 N.E.2d 757, 764 (2000). Thus, we will sustain a damages award unless it is beyond the range of fair and reasonable compensation, the result of passion or prejudice, or so large that it shocks the conscience. *Richardson v. Chapman,* 175 Ill. 2d 98, 113, 676 N.E.2d 621, 628 (1997). In the instant case, we find that the evidence presented adequately supports the

pain and suffering and disfigurement and disability damages awarded to the plaintiff.

The plaintiff testified that, just before the accident, he heard a loud blast that sounded like a shotgun, after which he briefly lost consciousness. When he regained consciousness, he saw that his left leg "was just dangling there" and that his calf was bent in the middle. He stated that he was "right on top of" the 50-pound wire when it snapped and that the impact knocked him two or three feet towards the edge of the boat. Although he did not feel anything initially, he began to feel excruciating pain as his coworkers carried him in a safety basket from the boat to a waiting ambulance. They had to carry him one-quarter of a mile in this manner to reach the ambulance.

The plaintiff's description of the pain he initially endured is corroborated by the medical evidence. Although no physician testified at the trial, the plaintiff submitted evidence depositions of Dr. Thomas Otto, the orthopedic surgeon who performed the intermedullary procedure on the plaintiff following his injury, and Dr. Lawrence Kriegshauser, an orthopedic surgeon who evaluated him 18 months after the accident. Both doctors testified that the plaintiff's injury was a "high energy fracture," which, as Dr. Kriegshauser explained, means "that a lot of force went through [the plaintiff's] leg." Dr. Otto described the type of injury the plaintiff sustained as "an incredibly painful injury."

The defendants do not dispute that the plaintiff is entitled to recover damages for the pain he endured when the injury occurred. Rather, they argue that the evidence does not support an award for *future* pain and suffering because (1) the evidence does not support a finding that he

will continue to experience pain or suffering permanently and (2) the intensity of the pain and suffering he was experiencing at the time of the trial (two years following the injury) was not severe enough to merit an award of $325,000. In assessing an award of damages, courts may take into account the duration and intensity of the plaintiff's pain and suffering as well as the impact of the injury on the plaintiff's enjoyment of life. *Hendricks,* 314 Ill. App. 3d at 809, 732 N.E.2d at 764 (noting that courts may consider the effect of injuries on the "normal pursuits and pleasures of life" as well as the nature, extent, and duration of the injury). There is no dispute that the plaintiff was no longer experiencing excruciating or constant pain at the time of the trial. The evidence was equally clear, however, that he did in fact continue to suffer symptoms related to his injury. The plaintiff was 22 years old when the accident occurred, with a life expectancy of 52 years. The uncontroverted medical evidence shows that the symptoms he was experiencing at the trial would likely continue for the remainder of the plaintiff's life. We find both the defendants' arguments minimizing the significance of these symptoms and their contentions attacking the validity of the medical evidence unavailing.

The plaintiff testified that although his left leg is not painful most of the time, it becomes sore after working a full day as a drywall hanger or after physical activity such as playing sports. The leg also becomes sore when there are sudden changes in the weather. In other words, although he does not experience intense pain constantly, he does experience moderate pain frequently. As we have noted, the plaintiff works as a drywall hanger. This is heavy physical labor that involves standing on his feet for many hours at a time and lifting heavy sheets of drywall.

The defendants make much of the fact that neither Dr. Otto nor Dr. Kriegshauser recommended that the plaintiff restrict his activities. However, Dr. Kriegshauser explained that he did not recommend any restrictions on physical activities only because the plaintiff's bones had completely healed and, therefore, the plaintiff could do no further damage by engaging in physical activity. Dr. Kriegshauser testified that increased activity would likely cause the plaintiff increased soreness and that he would have to decide for himself how much pain he was willing to tolerate in order to engage in physical activities he enjoys. It is not clear from the record to what extent the plaintiff curtails his activities to avoid this increased soreness, if at all. He testified that he is able to ride his bicycle, mow his lawn, care for his garden, and walk his dog. He also testified that the more he used his leg, the more soreness he experienced. To the extent that the plaintiff must choose between limiting the amount of time he can spend engaging in these activities or feeling pain, his ability to enjoy life is diminished. As noted, this, too, is an element the court may consider in awarding damages for pain and suffering.

The plaintiff further testified that he walks with a limp at all times and that his left shin is numb from the ankle to the knee. The defendants state in their brief that the plaintiff testified that the numbness "just felt 'weird.'" This statement takes the plaintiff's testimony out of context. On cross-examination, he was asked: "And this numbness, it causes no problems. It just feels weird?" He responded: "It's just numb. It's just numb. It don't [*sic*] cause no problems, no." While the plaintiff agreed that the numbness did not hurt or cause additional problems, he did not say that it "just felt weird" or that it was not

unpleasant. We agree with his counsel's statement at oral arguments that numbness may not be pain, but it is suffering. Although we agree that such symptoms are less onerous than constant excruciating pain, we nevertheless believe they are severe enough to be compensable.

As noted, the duration of a plaintiff's pain and suffering is an element to be considered in assessing damages. Both physicians testified that the plaintiff's bone had fully healed by July 25, 2001, two months following the injury. Both also testified that he suffered from soft tissue damage that would likely be permanent. Dr. Kriegshauser testified at length about periostitis, the condition with which he diagnosed the plaintiff. He explained that periostitis is a swelling of the outer layer of the bone. Because of this swelling, the surrounding tissue adheres to the bone as the plaintiff moves his leg, rather than gliding over it, which causes the soreness. According to Dr. Kriegshauser, the periostitis and soft tissue soreness that normally follow a fracture usually last for a few months to one year following the injury. According to Dr. Otto, it might last up to two years. According to Dr. Kriegshauser, if it has not subsided within the normal recovery period, the condition will likely be permanent. Although Dr. Otto did not render an opinion on the likely duration of the soreness the plaintiff was experiencing, he did testify that the swelling was likely to be permanent. Dr. Kriegshauser also noted that the tissue damage that accompanies a fracture is more extensive with a high energy fracture such as the plaintiff's than it would be with a less severe injury.

The defendants offered no expert medical opinion to the contrary. They contend, however, that Dr. Kriegshauser's opinion that the plaintiff's periostitis would

likely be permanent was based upon a hypothetical proposition that proved to be untrue. Specifically, defense counsel asked Dr. Kriegshauser to assume that the plaintiff was still experiencing pain at the trial and explain what that would indicate about his prognosis. On cross-examination, the following exchanges took place:

> "Q. Okay. And if Mr. Bowman is still experiencing this soreness that he told you about on December 18, 2002, in April of this year, 2003, what effect would that have on your opinion as to prognosis regarding the periostitis?
>
> A. *It would just confirm my prognosis of a permanent type condition for him.*
>
> * * *
>
> Q. Now will this condition, assuming he is still experiencing the same symptoms in April of this year that he did in December of last year, will this condition stay the same, will it get worse, will it get better, do you have an opinion on that?
>
> A. My opinion *was* it was probably going to be about the same. It's possible it could get worse, it's possible it could get better, *but it appears from talking to him it [was] fairly stabilized over the past several months before I saw him. And therefore I think it most likely will stay the same.*" (Emphases added.)

It appears clear to us that Dr. Kriegshauser based his opinion on the plaintiff's condition at the time he examined him in December 2002, not on the hypothetical assumption he was asked to make about the plaintiff's condition in April 2003. Moreover, as we have already concluded, the plaintiff was still experiencing pain in April 2003, even though his pain was not constant either in December 2002 or in April 2003. We therefore conclude

that the evidence supports the conclusion that the plaintiff's symptoms will be permanent. Considering the severity of his initial pain and the duration of his milder but still very real periostitis symptoms, we cannot agree with the defendants that $325,000 was excessive.

C. Maintenance and Cure

The defendants raise two arguments to support their contention that the maintenance and cure award was excessive. They contend that (1) the plaintiff was not entitled to maintenance for the first four months of his convalescence because he lived with his father rent-free and therefore did not incur living expenses and (2) he failed to offer sufficient evidence of the expenses he did incur. Although we are not persuaded that the plaintiff failed to carry his burden of proving he was entitled to maintenance at all, we find that he did not show he was entitled to maintenance in the amount of $7,200.

The plaintiff contends that he is entitled to maintenance of $40 per day for the entire recovery period. Relying on *McMillan*, he argues that it would defeat the purpose of maintenance and cure to allow the defendants to refuse to pay maintenance at the outset, thereby forcing the plaintiff to rely on the benevolence of his father, and then argue that because he incurred no expenses, they have no obligation to pay maintenance.

In *McMillan*, the court noted that the plaintiff lived rent-free for all but one month of his convalescence and only testified to incurring costs of $15 per day for food. *McMillan*, 885 F. Supp. at 463. The court, however, found that the $40 per day requested in the plaintiff's complaint was a more appropriate measure of damages because the

plaintiff "was forced to live with family and friends because of the economic necessity created by [the shipowner's] termination and refusal to reinstate his maintenance and cure." *McMillan,* 885 F. Supp. at 464. The court explained that the purpose of maintenance is to provide an incentive to shipowners to provide for the seaman's health and welfare following an accident or illness so as to make the seaman "as whole as possible." *McMillan,* 885 F. Supp. at 465. The court concluded that allowing shipowners to avoid their obligation to pay maintenance and cure "by forcing an injured seaman to involuntarily seek the financial support of family and friends" would defeat this stated purpose because it would provide an incentive for the shipowner to refuse to pay maintenance and would not make the seaman as whole as possible following the injury. *McMillan,* 885 F. Supp. at 465.

We find the court's reasoning in *McMillan* sound but inapplicable to the facts before us. The evidence showed that the plaintiff lived with his father *prior to his accident* as well as during the first four months of his convalescence and that he moved into his own apartment when his father sold his home. This fact alone distinguishes the instant case from *McMillan,* where the plaintiff was 34 years old and had not lived with his parents for many years before suffering the injury that was the subject of his Jones Act suit. *McMillan,* 885 F. Supp. at 465. In *Perkins v. Wood Towing Co.,* No. Civ. A. 97-3664 (E.D. La. September 29, 1999) (unpublished order), a federal district court distinguished the case before it from *McMillan* by noting the plaintiff in *McMillan* had not lived with his parents prior to the accident, while the plaintiff in *Perkins,* like the plaintiff in this case, did. *Perkins,* order at 3 n.2.

We think this distinction is sound. When an injured seaman who has been living independently of his family moves in with family or friends after an injury deprives him of his income, courts may presume that he would have continued to incur living expenses had he not been forced by his employer's refusal to pay maintenance to rely on the largesse of his family or friends. In such a case, the seaman is not actually incurring expenses *only* because he is unable to pay the expenses he ordinarily incurs. When an injured seaman already lives with his family rent-free and does not ordinarily incur living expenses, the concerns raised by the *McMillan* court are simply not implicated. We find nothing in the record to indicate that the plaintiff would not have continued to live with his father rent-free if not for the accident. Therefore, we do not think the record supports an award of $40 per day for those first four months.

The plaintiff did, however, present evidence that he incurred some expenses while living with his father. Specifically, he testified that he paid his father $50 per week for groceries and paid his father's car insurance during this time. The defendants argue that the plaintiff did not offer sufficient evidence even to support an award of $50 per week for this period because his testimony at the trial conflicted with his discovery deposition testimony. We think this argument mischaracterizes that testimony. At the trial, the defendants' counsel challenged the plaintiff's testimony that he paid his father for groceries and insurance, by reading a portion of his discovery deposition. The following exchange took place:

> "Q. * * * Question, ['][W]hen you were living with him,[']referring to your dad, [']were you paying any rent or['] – and your answer was ['][N]o.['] Question,

['][S]o he was – it was just like when you were a kid and your dad was essentially taking care of you?['] Answer, ['][Y]es.['] Question, ['][H]e wasn't asking you to pay him rent or stuff like that?['] Answer, ['][N]o.['] That was your testimony?

A. Yes. *But you asked about rent.*" (Emphasis added.)

The portion of the deposition testimony that was read into the record did not conflict with the plaintiff's trial testimony. Both times, he stated that he did not pay his father rent. The mere fact that the defendants' counsel added the colloquial phrase "or stuff like that" to his question does not change the plaintiff's meaning.

We also note that the plaintiff required the assistance of both his father and his girlfriend to care for himself during the first few weeks of his recovery because he was not yet ambulatory. Under these circumstances, we do not interpret the plaintiff's positive response to defense counsel asking if "it was just like when [he was] a kid" with his father taking care of him to mean any more than that the plaintiff's father was, in fact, taking care of him. We do not find his testimony to be in conflict. Further, because the plaintiff's burden of proving expenditures is so light, we find his testimony alone sufficient to show that he actually incurred expenses for $50 per week during this period. See *McMillan*, 885 F. Supp. at 463 (a plaintiff satisfies his burden merely by testifying to his actual expenses or reasonable living costs in his area).

The plaintiff urges us to sustain the award for $40 per day for this period because "[t]he court can be presumed to have an idea of the cost of insurance an [*sic*] on that basis can rationally determine an award." We disagree. Although

the plaintiff's burden of proving his expenses is light, it is still his burden. See *McMillan*, 885 F. Supp. at 463 (calling the seaman's burden "feather light"). There is nothing in the record from which a court might draw reasonable inferences regarding the amount of insurance the plaintiff paid. We do not know what type of car the plaintiff's father drives, how old the car is, whether it is stored in a garage, how far his father commutes in his car, or anything about his father's driving record. We do not even know how many cars he owns. Thus, we conclude that he has sustained his burden only with respect to the $50 per week for groceries he paid during the first four months.

Our conclusion is different with respect to the two months during which the plaintiff and his girlfriend lived on their own. We find that the record adequately supports the maintenance award of $40 per day. This amount comes to roughly $1,200 per month. Although the plaintiff did not testify to precise amounts, he testified that he had to borrow money from his father to make car loan payments and pay utility bills. Although he did not testify what he paid for rent, we think it reasonable for the court to presume that he had to pay rent for his apartment. Likewise, he did not testify to paying car insurance or buying groceries, but we find it reasonable to presume that he incurred these costs as well. Indeed, to infer that he did not would defy logic. It would have been preferable for the plaintiff to provide at least an estimate of his monthly living expenses during the relevant period; however, given that $1,200 per month is a nominal amount of money on which to live, we believe the evidence he did present demonstrated that he incurred *at least* $1,200 per month in living expenses during the last two months of his recovery period.

We also note that courts have the option to award maintenance on the basis of a customary amount established by prior case law without a consideration of the seaman's actual or estimated living expenses. *McMillan*, 885 F. Supp. at 463. It would be incongruous to allow maintenance awards to be determined in this manner and yet deny a plaintiff maintenance when he has presented evidence that he incurred the normal costs associated with living independently in an apartment.

In sum, we find that the plaintiff proved that he incurred $50 per week in expenses for the first four months of his recovery and at least $40 per day in expenses for the remaining two months of his recovery period. He was released from the hospital on May 28, 2001, and released by Dr. Otto to return to work on November 29. May 28 to September 30 represents a period of 126 days, or 18 weeks. The plaintiff is therefore entitled to $900 in maintenance for this period. October 1 to November 29 is 60 days, for which the plaintiff is entitled to $2,400. This comes to a total of $3,300 in maintenance. On remand, the award should be reduced accordingly.

D. Attorney Fees

At oral arguments, the plaintiff conceded that he was not entitled to recover attorney fees. A Jones Act plaintiff may be entitled to recover attorney fees if his employer's failure to pay maintenance and cure was willful, callous, or recalcitrant. See *Vaughan v. Atkinson*, 369 U.S. 527, 530-31, 8 L. Ed. 2d 88, 92, 82 S. Ct. 997, 999-1000 (1962). In the instant case, the plaintiff proffered testimony that he called the corporate department responsible for handling maintenance claims and was told he could only apply

for maintenance only if he made a recorded statement, something he had been advised not to do. Because he could not testify to whom he spoke, the court sustained the defendants' objection to the proffered testimony on hearsay grounds. We can find nothing else in the record to support a finding that the defendants acted willfully and callously in denying maintenance. Therefore, we agree with the parties that the plaintiff was not entitled to attorney fees and direct the trial court to reduce his award accordingly.

III. CONCLUSION

For the foregoing reasons, we affirm the portion of the trial court's order awarding the plaintiff damages for pain and suffering and disfigurement and disability. We remand, however, with directions to reduce the maintenance and cure award to $3,300 and vacate the award of attorney fees.

Affirmed in part and reversed in part; cause remanded with directions.

CHAPMAN, P.J., with HOPKINS and KUEHN, JJ., concurring.

STATE OF ILLINOIS
IN THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY; BELLEVILLE, ILLINOIS

DAVID W. BOWMAN, PLAINTIFF, VS AMERICAN RIVER TRANSPORTATION COMPANY and ARCHER-DANIELS-MIDLAND COMPANY, DEFENDANTS.	)	NO. 01-L-416

ORDER

(Filed Jun. 11, 2003)

This cause comes before the Court on Plaintiff's David Bowman's complaint for damages against Defendant's American River Transportation Company and Archer-Daniels Midland Company. The Court having received the stipulations and written submissions of the Attorneys, and after considering the entire record and being fully advised in the premises hereby FINDS; in favor of Plaintiff and against the Defendant's. Court further finds that there is no contributory negligence on Plaintiff [sic] behalf.

JONES ACT AND UNSEAWORTHINESS

The Court finds the Plaintiff is entitled to Past Lost Wages in the Amount of Twelve Thousand Dollars ($12,000.00). The Court is persuaded by the testimony of Drs. OTT and Kriegshauser that the more active Plaintiff becomes the more pain he will suffer. Accordingly, the

Court awards Three Hundred Twenty Five Thousand Dollars ($325,000.00) to the Plaintiff for pain and suffering and disability and disfigurement.

MAINTENANCE AND CURE

The Court finds the Plaintiff is entitled to Cure in the in the [sic] amount of Forty Dollars ($40.00) per day from the date of injury until medical release which amounts to Seven Thousand Two Hundred Dollars ($7,200.00). Further, the Court finds the Plaintiff is entitled to Attorney fees, in the amount of Seven Thousand Two Hundred Dollars ($7,200.00), due to Defendant's unreasonable and callous view of its Maintenance and Cure obligation.

IT IS THEREFORE ORDERED:

JUDGEMENT FOR PLAINTIFF

PAST LOST WAGES: $12,000.00

PAIN SUFFERING, DISABILITY AND DISABILITY: $325,000.00

MAINTENANCE AND CURE: $7,200.00

ATTORNEY FEES: $7,200.00

Attorneys: **Enter:** Jun 11, 2003

_____
Plaintiff

_____ 6/11/03
Defendant **Judge**

State of Illinois

**IN THE TWENTIETH JUDICIAL CIRCUIT,
ST. CLAIR COUNTY, BELLEVILLE, ILLINOIS**

David W. Bowman, PLAINTIFF vs. American River Transportation Company Defendant	No. 01-L-416

ORDER

(Filed Oct. 17, 2001)

This cause coming before the Court, the Court being fully advised in the premises and having jurisdiction of the subject matter;

The Court finds: _____

IT IS THEREFORE ORDERED:

Plaintiff's Motion to Strike Jury Demand is called heard and granted. Case removed to non jury Docket.

Attorneys: Enter:

Jerry Schneller
Plaintiff

James O. Hacking
Defendant

/s/ Lloyd Cueto
Judge

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

Ms. Gail G. Renshaw
The Lakin Law Firm
301 Evans Avenue
P.O. Box 229
Wood River, IL 62095-0027

No. 99094 – David W. Bowman, respondent, v. American River Transportation Company et al., petitioners. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today ALLOWED the petition for leave to appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(g) concerning certain notices which must be filed.

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

DAVID W. BOWMAN, Plaintiff, vs. AMERICAN RIVER TRANSPORTATION COMPANY, a corporation, and ARCHER-DANIELS-MIDLAND COMPANY, a corporation, Defendants.	)	No. _____

MOTION TO STRIKE
DEFENDANT'S JURY DEMAND

(Filed Sep. 24, 2001)

Now comes the plaintiff, Mr. David Wilson Bowman, by his attorneys The Lakin Law Firm, and moves this Honorable Court to strike the defendant's jury demand in the above-styled matter on the ground that defendant has no legal right to demand a jury trial of this cause. *Allen v. Norman Brothers, Inc.*, 286 Ill.App.3d 1091, 222 Ill.Dec. 705, 678 N.E.2d 317 (1997); *Gibbs v. Lewis and Clark Marine, Inc.*, 700 N.E.2d 227 (Ill. 5th Dist. 1998); *Hearn v. American River Transportation Co.*, 707 N.E.2d 1283 (Ill.App.5th Dist. 1999); *Hendricks v. Riverway Harbor Service, St. Louis, Inc.*, 732 N.E.2d 757 (Ill.App. 5th Dist. 2000).

WHEREFORE, plaintiff respectfully prays that this Honorable Court strike the jury demand of the defendant.

THE LAKIN LAW FIRM, P.C.

BY: /s/ Gerard B. Schneller
Gerard B. Schneller 06205863
Attorney for Plaintiff
301 Evans Avenue
PO Box 229
Wood River IL 62095-0229
618/254-1127

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing was mailed, postage prepaid, on September 20, 2001.

Tonkin & Mondl, L.C. and
James K. Mondl, and
James O. Hacking, III
701 Market Street, Suite 260
St. Louis, MO 63101
314-231-2794
Attorneys for Defendant

/s/ Debra L. Ramirez

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

DAVID W. BOWMAN, Plaintiff, vs. AMERICAN RIVER TRANSPORTATION COMPANY, a corporation, and ARCHER-DANIELS-MIDLAND COMPANY, a corporation, Defendants.	)	No. 010416

COMPLAINT

(July 11, 2001)

Count I
(Jones Act)

COMES NOW the plaintiff, David W. Bowman, by and through his undersigned counsel, and for his cause of action against the defendant, American River Transportation Company, states as follows:

1. On or about May 25, 2001, plaintiff was employed by defendant as a deckhand and member of the crew of the M/V Bill Pehler, which was owned, operated and/or controlled by said defendant and was at all relevant times a vessel in navigation.

2. At all times herein mentioned, the defendant was a corporation organized and existing by virtue of law, which then or thereafter assumed all liabilities of plaintiff's employment, and now is in the business of owning

and operating towboats and barges upon the inland waterways of the United States, including the Mississippi River, and was and is doing business in the County of St. Clair, State of Illinois.

3. The plaintiff, as a seaman, brings suit against the defendant under the provisions of 46 U.S.C., Section 688, *et seq.*, commonly called the Jones Act.

4. The plaintiff, while in the performance of his duties, was severely injured when a wire broke.

5. The defendant, at said time and place, by and through its agents, servants and employees, was negligent in that it failed to provide plaintiff with a reasonably safe place to work, reasonably suitable equipment to perform his assigned duties, adequate supervision in performing his assigned duties, and adequate assistance to perform his assigned job duties.

6. As a direct and proximate result, in whole or in part of the aforesaid negligent acts and/or omissions of defendant, plaintiff was injured in one or more of the following respects:

(a) He was made sick, sore, lame and disordered and suffered extensive injuries to his left leg, right leg, and right ankle;

(b) He has lost money from loss of wages in the past and is reasonably certain to lose wages in the future;

(c) He has suffered a loss of earning capacity;

(d) He has had pain and suffering in the past and is reasonably certain to experience pain and suffering in the future;

(e) He has become obligated for large sums of money for necessary medical care, treatment and services in the past and will be required to expend money for necessary medical care, treatment and services in the future;

(f) He has had disability in the past and will continue to have disability in the future;

(g) He has sustained permanent disfigurement.

WHEREFORE, plaintiff, David W. Bowman, prays for judgment in his favor and against the defendant, American River Transportation Company, a corporation, for an amount in excess of Fifty Thousand ($50,000.00) Dollars, together with costs of suit, prejudgment interest, and such other and further relief as the Court may deem just and proper.

Count II
(Unseaworthiness)

COME NOW the plaintiff, David W. Bowman, by and through his undersigned counsel, and for his cause of action against the defendant, American River Transportation Company, states as follows:

1. On or about May 25, 2001, plaintiff was employed by defendant as a deckhand and member of the crew of the M/V Bill Pehler, which was owned, operated and/or controlled by said defendant and was at all relevant times a vessel in navigation.

2. That at all times herein mentioned, the defendant was a corporation organized and existing by virtue of law, which then or thereafter assumed all liabilities of plaintiff's employment, and now is in the business of owning

and operating towboats and barges upon the inland waterways of the United States, including the Mississippi River, and was and is doing business in the County of St. Clair, State of Illinois.

3. The plaintiff, as a seaman, brings suit against the defendant under the provisions of the General Maritime Law of the United States, so much of which is pertinent hereto, including the warranty of seaworthiness.

4. That at the aforementioned time and place, the plaintiff, while in the performance of his duties, was severely injured when a wire broke.

5. The defendant's vessel was at that time unseaworthy and not reasonably fit for its intended purpose.

6. As a direct and proximate result, in whole or in part of the unseaworthiness of the defendant's vessel, plaintiff was injured in one or more of the following respects:

(a) He was made sick, sore, lame and disordered and suffered extensive injuries to his left leg, right leg, and right ankle;

(b) He has lost money from loss of wages in the past and is reasonably certain to lose wages in the future;

(c) He has suffered a loss of earning capacity;

(d) He has had pain and suffering in the past and is reasonably certain to experience pain and suffering in the future;

(e) He has become obligated for large sums of money for necessary medical care, treatment and services in the past and will be required

to expend money for necessary medical care, treatment and services in the future;

(f) He has had disability in the past and is reasonably certain to experience disability in the future;

(g) He has sustained permanent disfigurement.

WHEREFORE, plaintiff, David W. Bowman, prays for judgment in his favor and against the defendant, American River Transportation Company, for an amount in excess of Fifty Thousand ($50,000.00) Dollars, together with costs of suit, prejudgment interest, and such other and further relief as the Court may deem just and proper.

Count III
(Maintenance & Cure)

COMES NOW the plaintiff, David W. Bowman, by and through his undersigned counsel, and for his cause of action against the defendant, American River Transportation Company, states as follows:

1. On or about May 25, 2001, plaintiff was employed by defendant as a deckhand and member of the crew of the M/V Bill Pehler, which was owned, operated and/or controlled by said defendant and was at all relevant times a vessel in navigation.

2. That at all times herein mentioned, the defendant was a corporation organized and existing by virtue of law, which then or thereafter assumed all liabilities of plaintiffs employment, and now is in the business of owning and operating towboats and barges upon the inland waterways of the United States, including the Mississippi

River, and was and is doing business in the County of St. Clair, State of Illinois.

3. The plaintiff, as a seaman, brings suit against the defendant under the provisions of the General Maritime Law of the United States, so much of which is pertinent hereto, including the warranty of seaworthiness.

4. That at the aforementioned time and place, the plaintiff, while in the performance of his duties, was severely injured when a wire broke.

5. That at all times herein mentioned, the M/V Bill Pehler was in the possession and/or control of the defendant.

6. That as a result of said injuries, the plaintiff has incurred extensive medical expense of treatment and other services.

7. That the plaintiff has not yet reached a point of maximum cure, and further medical expenses will be incurred in the future.

8. That the defendant has failed to meet its duty under General Maritime Law to provide its employee, the plaintiff, with full and adequate maintenance and cure for said injuries.

9. The defendant's failure is in contravention of plaintiff's established maritime rights.

WHEREFORE, plaintiff, David W. Bowman, by and through his undersigned counsel, prays for judgment in his favor and against the defendant, American River Transportation Company, in an amount of not less than $40.00 per day, and to pay all reasonable medical expenses

incurred in the diagnosis and treatment of his injuries, together with legal interest thereon from the judicial demand until paid, and for all costs of these proceedings, attorney fees and all general and equitable relief as the Court deems just and proper.

Count IV
(Jones Act)

COMES NOW the plaintiff, David W. Bowman, by and through his undersigned counsel, and for his cause of action against the defendant, Archer-Daniels-Midland Company, states as follows:

1. On or about May 25, 2001, plaintiff was employed by defendant as a deckhand and member of the crew of the M/V Bill Pehler, which was owned, operated and/or controlled by said defendant and was at all relevant times a vessel in navigation.

2. At all times herein mentioned, the defendant was a corporation organized and existing by virtue of law, which then or thereafter assumed all liabilities of plaintiff's employment, and now is in the business of owning and operating towboats and barges upon the inland waterways of the United States, including the Mississippi River, and was and is doing business in the County of St. Clair, State of Illinois.

3. The plaintiff, as a seaman, brings suit against the defendant under the provisions of 46 U.S.C., Section 688, *et seq.*, commonly called the Jones Act.

4. The plaintiff, while in the performance of his duties, was severely injured when a wire broke.

5. The defendant, at said time and place, by and through its agents, servants and employees, was negligent in that it failed to provide plaintiff with a reasonably safe place to work, reasonably suitable equipment to perform his assigned duties, adequate supervision in performing his assigned duties, and adequate assistance to perform his assigned job duties.

6. As a direct and proximate result, in whole or in part of the aforesaid negligent acts and/or omissions of defendant, plaintiff was injured in one or more of the following respects:

(a) He was made sick, sore, lame and disordered and suffered extensive injuries to his left leg, right leg, and right ankle;

(b) He has lost money from loss of wages in the past and is reasonably certain to lose wages in the future;

(c) He has suffered a loss of earning capacity;

(d) He has had pain and suffering in the past and is reasonably certain to experience pain and suffering in the future;

(e) He has become obligated for large sums of money for necessary medical care, treatment and services in the past and will be required to expend money for necessary medical care, treatment and services in the future;

(f) He has had disability in the past and will continue to have disability in the future;

(g) He has sustained permanent disfigurement.

WHEREFORE, plaintiff, David W. Bowman, prays for judgment in his favor and against the defendant, Archer-Daniels-Midland Company, a corporation, for an amount in excess of Fifty Thousand ($50,000.00) Dollars, together with costs of suit, prejudgment interest, and such other and further relief as the Court may deem just and proper.

Count V
(Unseaworthiness)

COME NOW the plaintiff, David W. Bowman, by and through his undersigned counsel, and for his cause of action against the defendant, Archer-Daniels-Midland Company, states as follows:

1. On or about May 25, 2001, plaintiff was employed by defendant as a deckhand and member of the crew of the M/V Bill Pehler, which was owned, operated and/or controlled by said defendant and was at all relevant times a vessel in navigation.

2. That at all times herein mentioned, the defendant was a corporation organized and existing by virtue of law, which then or thereafter assumed all liabilities of plaintiff's employment, and now is in the business of owning and operating towboats and barges upon the inland waterways of the United States, including the Mississippi River, and was and is doing business in the County of St. Clair, State of Illinois.

3. The plaintiff, as a seaman, brings suit against the defendant under the provisions of the General Maritime Law of the United States, so much of which is pertinent hereto, including the warranty of seaworthiness.

4. That at the aforementioned time and place, the plaintiff, while in the performance of his duties, was severely injured when a wire broke.

5. The defendant's vessel was at that time unseaworthy and not reasonably fit for its intended purpose.

6. As a direct and proximate result, in whole or in part of the unseaworthiness of the defendant's vessel, plaintiff was injured in one or more of the following respects:

(a) He was made sick, sore, lame and disordered and suffered extensive injuries to his left leg, right leg, and right ankle;

(b) He has lost money from loss of wages in the past and is reasonably certain to lose wages in the future;

(c) He has suffered a loss of earning capacity;

(d) He has had pain and suffering in the past and is reasonably certain to experience pain and suffering in the future;

(e) He has become obligated for large sums of money for necessary medical care, treatment and services in the past and will be required to expend money for necessary medical care, treatment and services in the future;

(f) He has had disability in the past and is reasonably certain to experience disability in the future;

(g) He has sustained permanent disfigurement.

WHEREFORE, plaintiff, David W. Bowman, prays for judgment in his favor and against the defendant, Archer-Daniels-Midland Company, for an amount in excess of Fifty Thousand ($50,000.00) Dollars, together with costs of suit, prejudgment interest, and such other and further relief as the Court may deem just and proper.

Count VI
(Maintenance & Cure)

COMES NOW the plaintiff, David W. Bowman, by and through his undersigned counsel, and for his cause of action against the defendant, Archer-Daniels-Midland Company, states as follows:

1. On or about May 25, 2001, plaintiff was employed by defendant as a deckhand and member of the crew of the M/V Bill Pehler, which was owned, operated and/or controlled by said defendant and was at all relevant times a vessel in navigation.

2. That at all times herein mentioned, the defendant was a corporation organized and existing by virtue of law, which then or thereafter assumed all liabilities of plaintiff's employment, and now is in the business of owning and operating towboats and barges upon the inland waterways of the United States, including the Mississippi River, and was and is doing business in the County of St. Clair, State of Illinois.

3. The plaintiff, as a seaman, brings suit against the defendant under the provisions of the General Maritime Law of the United States, so much of which is pertinent hereto, including the warranty of seaworthiness.

4. That at the aforementioned time and place, the plaintiff, while in the performance of his duties, was severely injured when a wire broke.

5. That at all times herein mentioned, the M/V Bill Pehler was in the possession and/or control of the defendant.

6. That as a result of said injuries, the plaintiff has incurred extensive medical expense of treatment and other services.

7. That the plaintiff has not yet reached a point of maximum cure, and further medical expenses will be incurred in the future.

8. That the defendant has failed to meet its duty under General Maritime Law to provide its employee, the plaintiff, with full and adequate maintenance and cure for said injuries.

9. The defendant's failure is in contravention of plaintiff's established maritime rights.

WHEREFORE, plaintiff, David W. Bowman, by and through his undersigned counsel, prays for judgment in his favor and against the defendant, Archer-Daniels-Midland Company, in an amount of not less than $40.00 per day, and to pay all reasonable medical expenses incurred in the diagnosis and treatment of his injuries, together with legal interest thereon from the judicial demand until paid, and for all costs of these proceedings, attorney fees and all general and equitable relief as the Court deems just and proper.

(1)

No. 05-896

In The

Supreme Court of the United States

DAVID BOWMAN,

Petitioner,

v.

AMERICAN RIVER
TRANSPORTATION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can Illinois grant to defendants sued under the Jones Act, 46 U.S.C. App. § 688, the same right to trial by jury that Illinois grants to other litigants in its courts?

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REASONS WHY THE PETITION SHOULD BE DENIED

This case turns on Illinois state court procedure. The trial court erroneously deprived defendant of its right to trial by jury, and the Illinois Supreme Court unanimously reversed and remanded for trial by jury. Petitioner presents no basis for this Court to assert jurisdiction over this appeal, or any sound reason for questioning the ruling by the Illinois Supreme Court. This Court should deny his Petition for Writ of Certiorari.

I. This Court lacks jurisdiction to review the Illinois Supreme Court decision.

This Court lacks jurisdiction over this appeal. The Illinois Supreme Court reversed and remanded for trial by jury in its state court. That trial has not taken place. Petitioner could moot any appeal by prevailing on retrial, or other issues regarding the Jones Act could arise when the case is tried the second time. At present, this appeal is interlocutory.

Petitioner cites 28 U.S.C. § 1257(a) as the basis for this Court's jurisdiction to grant certiorari (Pet. Brief at 1). That statute states:

> *Final judgments* or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or

> claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States

28 U.S.C. § 1257(a) (emphasis added).

Because the Illinois Supreme Court remanded for a trial by jury, the judgment is not final. *Johnson v. California*, 541 U.S. 428 (2004); *O'Dell v. Espinoza*, 456 U.S. 430 (1982) ("Because the Colorado Supreme Court, 633 P.2d 455, remanded this case for trial, its decision is not final 'as an effective determination of the litigation.'" 456 U.S. at 430). While this court has created very limited exceptions to the finality requirement, this case is not one of them, and Petitioner has not attempted to argue otherwise. "Compliance with the provisions of § 1257 is an essential prerequisite to our deciding the merits of a case brought here under that section." *Johnson*, 541 U.S. at 431. Absent jurisdiction to review the decision by the Illinois Supreme Court, issuing a writ of certiorari would be inappropriate.

II. The Illinois Supreme Court decision does not conflict with federal court rulings.

Even if this Court had jurisdiction over this appeal, which it does not, Petitioner presents inadequate justification for reviewing the decision by the Illinois Supreme Court. The Illinois Supreme Court in this case applied an Illinois jury trial provision to litigation initiated in state court. The trial court ruling was based in part on an incorrect interpretation of a federal statute – the "Jones Act" – that erroneously provided plaintiffs, but not defendants, with the right to demand trial by jury.

The Jones Act, 46 U.S.C. App. § 688, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

Based on an erroneous reading of the "election" clause of this statute, the Illinois trial court below deprived defendants of the right to trial by jury. The Illinois Supreme Court reversed that error, and granted Respondent a trial by jury. Petitioner's claim here that the Illinois Supreme Court decision conflicts with rulings from federal courts (Pet. Br. at 6) is unfounded.

Petitioner cites five cases to support his assertion that federal courts have reached decisions in conflict with that of the Illinois Supreme Court (Pet. Br. at 6). Two of those cases present not the slightest hint of conflict, one actually refutes Petitioner's argument, and the other two address the issue in a context so dissimilar from that here that those rulings can hardly be characterized as conflicting with this one.

Petitioner gives no indication of the relevance of either *McCarthy v. American Eastern Corp.*, 175 F.2d 724 (3rd Cir. 1949) or *Texas Menhaden Co. v. Palermo*, 329 F.2d 579 (5th Cir. 1964). Neither case involved state court procedure, or even a question similar to that presented here. The question in *McCarthy* was whether a seaman could join his Jones Act negligence suit with a general

maritime law claim for unseaworthiness. That issue was not presented here; Petitioner asserted both such actions in the trial court, as *McCarthy* and other cases suggested he could. The discussion in *McCarthy* of the purpose behind the Jones Act refutes, rather than supports, Petitioner's claim that the decision in this case conflicts with any other decision:

> In our view the election to which the Jones Act refers is an election of remedies as between a suit in admiralty and a civil action. . . . It was the purpose of the 'election' clause of the Jones Act, we think, to make certain that an injured seaman, instead of suing in admiralty, could at his option assert his cause of action for personal injuries in the federal court in an action at law regardless of diversity of citizenship, thereby obtaining the right to a jury trial in every case in which the injuries were serious enough to bring the claim within the jurisdictional amount of $3,000.

McCarthy, 175 F.2d at 726-27 (footnote omitted). Thus, *McCarthy* suggests that the right of trial by jury is a characteristic of an action at law. This is precisely what the Illinois Supreme Court concluded in this case. Petitioner's allegation of a conflict with this case is inaccurate.

Texas Menhaden is equa'ly unhelpful to Petitioner. *Texas Menhaden* addressed whether a party was entitled to trial by jury of a Jones Act negligence case filed in admiralty alongside a general maritime law claim for unseaworthiness. *Texas Menhaden*, 329 F.2d at 580. The court there noted that neither party is entitled to a jury in admiralty. *Id.* To the extent any statement in that case addresses the issue in this one, it refutes Petitioner's argument that he was entitled to deprive another party of

trial by jury in state court: "The Jones Act merely affords the injured seaman the choice between a suit in admiralty without a jury and a suit on the civil side of the docket with a jury." *Texas Menhaden*, 329 F.2d at 580. Like *McCarthy*, *Texas Menhaden* provides no support for Petitioner's contention that the holding in this case conflicts with holdings in other cases.

Only one of the cases Petitioner cites, *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480 (5th Cir. 1992), actually began in state court and thus involved state court procedure. The seaman in *Linton* filed suit in state court invoking the Louisiana state court's "admiralty" jurisdiction, and demanded a bench trial, as a statute in that state allowed. The defendant removed the case to federal court on the theory that the seaman's claim under state "admiralty" jurisdiction by definition asserted a claim within the federal court's exclusive admiralty jurisdiction. The Fifth Circuit Court of Appeals rejected that argument, and stated that whether either party in state court received a trial by jury was strictly a matter of state law. Quoting a prior case that had "correctly addressed" the issue, *Linton* noted: "Procedurally, whether he, or the defendant, would have a right to trial by jury would depend on state civil procedure." *Linton*, 964 F.2d at 1487, *quoting Pellegrin v. Intl. Indep. Towing*, No. 88-5525, slip op. at 3-4 (E.D. La. March 6, 1989). The holding in *Linton* that the right to trial by jury in state court Jones Act litigation is a matter of state law is not only true with most state trial court procedural issues, it is precisely what the Illinois Supreme Court concluded in this case: "We therefore hold that the availability of a jury trial in Jones Act cases is a question that is properly controlled by the normal laws of the forum." (*Bowman v. American*

River Transp. Co., 217 Ill.2d 75, 94, 838 N.E.2d 949, 959 (2005) (Petitioner's Appx. at 19-20). Because the Fifth Circuit Court of Appeals in *Linton* concluded that the right of trial by jury in Jones Act cases is a matter of state law, the Illinois Supreme Court decision in this case reaching the same conclusion can scarcely be characterized as conflicting.

The only two cases cited by Petitioner which could remotely support Petitioner's assertion that the decision in this case conflicts with rulings from federal courts are *Rachal v. Ingram Corp.*, 795 F.2d 1210 (5th Cir. 1986), and *Craig v. Atlantic Richfield*, 19 F.3d 472 (9th Cir. 1994). Those cases held that a Jones Act seaman who files an action in federal court invoking federal question jurisdiction can amend his complaint thereafter to invoke the court's admiralty jurisdiction. Neither party in this case sought to change the trial court's jurisdiction. That issue simply never arose. The dissimilarities between the issues in those cases – amending a complaint to change the jurisdictional basis in federal court – and in this case – depriving a defendant in state court of trial by jury – are sufficiently extensive that a real conflict between them is doubtful.

That *Rachel* and *Craig* involved federal courts resolving federal issues and the question in state courts present state issues is not a novel conclusion. Louisiana courts have understood that *Rachel* and *Craig* presented questions different from those presented in state court Jones Act cases. When seamen in Louisiana raised the same issue that confronted the Illinois Supreme Court here, one Louisiana court stated, "While we do not take issue with the jury trial question in federal court, we note that Hahn brought this suit in state court under the 'saving to

suitors' clause of 28 U.S.C. sec. 1333." *Hahn v. Nabors Offshore Corp.*, 820 So. 2d 1283, 1284 (La. Ct. App. 2002). Like the Illinois Supreme Court, *Hahn* held that whether defendants are entitled to demand trial by jury in state court is strictly a matter of state law. *Id.* at 1285. *See also, Smith v. Cliff's Drilling Co.*, 562 So. 2d 1030, 1031 (La. Ct. App. 1990) (availability of jury trial in state court Jones Act litigation is the "'same as it would be to any other civil litigant before our courts.'")

Contrary to Petitioner's claims here, the Illinois Supreme Court decision simply does not conflict with rulings from federal courts.

III. The Illinois Supreme Court correctly decided the issue before it.

Even if the decision here conflicts with rulings from federal courts, which is doubtful, the Illinois Supreme Court reached the correct result. The Jones Act does not dictate to Illinois and every other state that it must deprive defendants of trial by jury in state court. The operative part of the Jones Act provides: "Any person who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury. . . ." 46 U.S.C. App. § 688. Petitioner argues that the statute's language allowing a seaman to, "at his election, maintain an action for damages at law, with the right of trial by jury" means that seamen have the election to not only maintain an action at law, but to also elect in an action at law whether either party has the right of trial by jury. The Illinois Supreme Court rejected this tortured reading of the statute, as many other courts have done.

The proper analysis begins with the assumption that, under our system of federalism, state courts are free to invoke their own procedure when resolving disputes based on federal statutes: "[F]ederal law takes the state courts as it finds them." *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 372 (1990). Moreover, the adequate-state-ground doctrine "accords respect to state courts as decision-makers by honoring their modes of procedure." *Id.* at 369 n.16.

Turning to the plain language of the Jones Act itself, seamen are given the right to sue for negligence, and to elect between actions at law and actions in admiralty (in courts where such distinctions exist). Petitioner asserts that the statute gives him an additional election – to choose between trial by jury and trial by judge. The Illinois Supreme Court properly concluded otherwise:

> We believe that anyone well versed in statutory construction, or even English grammar, would find the plain language of that sentence clearly states that the "election" to be made by the seaman pertains to his choice to maintain an action "at law," and not his election of a "right of trial by jury." Under the principle of statutory construction known as the last antecedent doctrine, relative or qualifying words or phrases in a statute serve only to modify words or phrases which are immediately preceding and do not modify those which are more remote.

Bowman, 217 Ill.2d 75, 83, 838 N.E.2d 949, 953 (2005) (Petitioner's Appx. at 7).

The Illinois Supreme Court analysis relied on various rules of statutory construction, including the "last antecedent doctrine" mentioned above. Under that doctrine, the

phrase "trial by jury" is presumed to modify the more proximate words "at law," thus entirely defeating Petitioner's arguments that "trial by jury" is modified by the remote word "election." As this Court previously explained, the "grammatical 'rule of the last antecedent,'" declares that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows. . . ." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Petitioner has yet to provide any rationale for discarding this sensible doctrine in favor of an unfair and unprecedented interpretation leaving only one side in a lawsuit with the right to trial by jury. The Illinois Supreme Court correctly concluded that the Jones Act gives seamen an election to sue at law, but not to dictate the procedure in such a suit: "Therefore, the rules of statutory construction clearly establish that the 'election' referred to in the Jones Act is *not* the seaman's election of a trial by jury, but his election to proceed 'at law' rather than in admiralty." *Bowman*, 217 Ill.2d at 85, 838 N.E.2d at 954 (Petitioner's Appx. at 9) (emphasis in original).

This Court's interpretation of the Jones Act shortly after Congress passed that statute bolsters the conclusion reached by the Illinois Supreme Court in this case. In *Panama Railroad v. Johnson*, 264 U.S. 375 (1924), this Court read the phrase at issue in the same way the Illinois Supreme Court did: "[The Jones Act] says 'may maintain' an action at law 'with the right of trial by jury,' the import of which is that the injured seaman is permitted, but not required, to proceed on the common-law side of the court *with a trial by jury as an incident*." *Panama Railroad*, 264 U.S. at 390-91 (emphasis added). Even more emphatically, *Panama Railroad* explained the ramifications of electing between an action in admiralty and an action at law: "In

this view the statute leaves the injured seaman free . . . to assert his right of action under the new rules on the admiralty side of the court. On that side the issues will be tried by the court, but *if he sues on the common-law side there will be a right of trial by jury.*" *Id.* at 391 (emphasis added). Petitioner's arguments here are flatly contrary to this Court's statement that the Jones Act allows seamen to elect between a court of admiralty and a court of law, the former of which carries no trial by jury, and the latter of which carries with it the usual jury trial rights.

Petitioner's interpretation of the Jones Act is at odds with that of many other authorities as well. For example, the Louisiana legislature adopted a short-lived statute in 1988 giving only seamen the right to determine whether their Jones Act suits in Louisiana state courts would be tried to a judge or a jury.[1] Obviously, if the right to trial by judge or jury was already an integral part of the Jones Act as Petitioner argues here, then Louisiana's statute would have been entirely unnecessary.

Louisiana's courts, like its legislature, have concluded that the Jones Act gives seamen no right to deprive defendants of their right to trial by jury in state court without a state statute to that effect. As discussed earlier, *Hahn v. Nabors Offshore Corp.*, 820 So. 2d 1283, 1285 (La. Ct. App. 2002), understood that jury trial rights in state court differ from those that arise in federal court. *Hahn* also understood that, in state court, the Jones Act does not dictate to

[1] Illinois has no similar legislation restricting the right to demand trial by jury to the plaintiff only. Louisiana has since repealed its own statute giving only plaintiffs in injury claims the right to trial by jury, and now both parties in that State are entitled to demand trial by jury. *See Hahn v. Nabors Offshore Corp.*, 820 So. 2d 1283 (La. Ct. App. 2002).

the states whether a litigant is entitled to trial by jury: "Unless and until a jury trial is specifically forbidden in certain cases, a defendant will be given the right to choose a jury, regardless of the choice made by the plaintiff." *Smith v. Cliff's Drilling Co.*, 562 So. 2d 1030, 1031 (La. Ct. App. 1990). *See also, Hahn v. Nabors Offshore Corp.*, 820 So. 2d 1283, 1285 (La. Ct. App. 2002) ("[B]ecause the right to trial by jury in admiralty/general maritime claims is no longer limited by [state statute], it is recognized in the instant case. As stated in *Parker*, 599 So. 2d at 301, 'it is within the province of the states to establish their own rules for the availability of jury trials.'")

The Illinois Fourth District Court of Appeals likewise rejected arguments identical to those asserted by Petitioner here, and reached the same conclusion reached by the Illinois Supreme Court in this case: "Based on our construction of the statute, we conclude the Jones Act does not limit the right to trial by jury to the plaintiff only. Procedural rules in a Jones Act claim are governed by the forum in which the claim is filed." *Hutton v. Consol. Grain & Barge Co.*, 341 Ill. App. 3d 401, 407, 795 N.E.2d 303, 308 (2003). *Hutton* interpreted the Jones Act as giving seamen only the election between suing at law where the right of trial exists, or suing in admiralty where no party has a right to a jury trial: "The Jones Act does not explicitly state only the plaintiff may elect a trial by jury. This would be true if the 'election' referred to in the statute was the election of trial by jury. Here, the phrase 'at his election' modifies 'may . . . maintain an action for damages at law.'" *Hutton*, 341 Ill. App. 3d at 406, 795 N.E.2d at 307.

The Illinois Supreme Court decision in this case was unanimous. Every judge on that Court concluded that a seaman may elect to file an action at law, but cannot elect

between a bench trial and a jury trial in state court. Only a strained and contorted reading of the Jones Act could lead to the unfair and unprecedented result that Petitioner urges here, and which the Illinois Supreme Court rightly rejected.

IV. This is the wrong case to correct misinterpretations of the Jones Act.

The Illinois Supreme Court ruling involved state procedure, and that Court correctly decided the issue before it. The federal issue in *Rachel* and *Craig* was wrongly decided by those courts. However, this case arising from state court is not the case to correct those federal court errors.

Sixty-six years after the Jones Act had been enacted, the Fifth Circuit Court of Appeals in *Rachal v. Ingram Corp.*, 795 F.2d 1210 (5th Cir. 1986), stated for the first time that a seaman could amend his complaint to change from an action at law with a jury demand to one invoking the court's admiralty jurisdiction which would be tried without a jury, despite the defendant's demand for trial by jury while the case was pending on the "law" side of the court. Although Federal Rule of Civil Procedure 15 allowing amendments to complaints suggested that leave to amend a pleading to invoke admiralty jurisdiction should be freely given, Federal Rule of Civil Procedure 39 suggested that a jury demand cannot be withdrawn without consent of the opposing party, unless the court finds that a right to trial by jury does not exist. In sorting out the issue, the Fifth Circuit opted to allow the seaman to amend the "at law" designation, dispensing with Rule 39

by concluding that the seaman alone can choose whether the case is before a judge or jury, and the defendant held no jury trial right. *Rachal*, 795 F.2d at 1217.[2] Although it is true that, in a sense, seamen can obtain non-jury trials by filing suit in federal court and invoking admiralty jurisdiction, the Court in *Rachel* was the first to hold that only the plaintiff can demand a jury trial in an action at law in federal court.

Thereafter, the Ninth Circuit Court of Appeals in *Craig v. Atlantic Richfield*, 19 F.3d 472 (9th Cir. 1994), followed *Rachal* without any independent analysis and concluded that seamen have a unilateral right, independent of the right to decide the forum, to decide whether the case will be tried to a judge or jury.

These recent judicial misinterpretations of the Jones Act have spawned highly critical law review articles, particularly from two law professors at the University of Texas, Professors David Robertson and Michael Sturley. In their first article, these scholars characterized the holding in *Rachel* as "serious error." David W. Robertson & Michael F. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*,

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[2] The Court could not simply conclude that the plaintiff should be allowed to freely amend his "at law" designation under Federal Rule of Civil Procedure 15, because the Fifth Circuit had fourteen years earlier in a Jones Act case in federal court on diversity grounds concluded that an "at law" designation creates in the defendant a Seventh Amendment right to trial by jury. Accordingly, the Fifth Circuit created the odd distinction between the right to trial by jury in Jones Act diversity cases and the right to trial by jury in Jones Act federal statute cases. For a more thorough critique of the *Rachal* case, *see* David W. Robertson & Michael F. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*, 30 J. Mar. L. & Com. 649, 661-63 (Oct. 1999).

30 Mar. L. & Com. 649, 663 (Oct. 1999). "The most serious problem with the *Rachel* mistake is the denial of Jones Act defendants' constitutional rights." *Id.* at 666. The premise for the *Rachel* ruling is "simply wrong." *Id.* at 670. *Rachel* distorts precedent and depends on "strained readings of the Jones Act and Rules 38(a) and 39(a)." *Id.* at 671.

In a second law review article, these scholars addressed the ill-conceived statements in *Rachel*:

> It is nothing short of astonishing to suggest that – in a forum in which jury trials are generally available at the request of either party – one party would have a unilateral right to choose between a jury trail and a bench trial. Such a right would be unprecedented in law, offensive to the Seventh Amendment, and contrary to basic notions of even-handed procedural fairness.
>
> Fortunately neither Congress nor the Supreme Court has ever endorsed this astonishing result, and thus the mistake first made by the Fifth Circuit in *Rachel*, and perpetuated by zealous advocates such as Mr. Dripps [Petitioner's counsel in this case], can still be corrected without too much difficulty.

David W. Robertson & Michael F. Sturley, *Understanding Panama R.R. v. Johnson: The Supreme Court's Interpretation of the Seaman's Elections Under the Jones Act*, 14 U.S.F. Mar. L.J. 229, 268 (2001-02).[3]

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[3] Professors Robertson and Sturley also agree with the conclusion reached by the Illinois Supreme Court here that, when filed in state court, state law determines the parties' respective rights to trial by jury in Jones Act cases: "And if the plaintiff brings her action in a state court, where the Seventh Amendment does not apply, the parties' jury

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While *Rachel* and *Craig* may need correction, this is not the case to correct them. This case involves state civil procedure. Comments by this Court here would not resolve questions involving federal procedure, and the holdings in *Rachel* and *Craig* would be left uncured by any ruling in this state procedure case. To correct the distorted holdings in those federal procedure cases, this Court should await an appeal in a federal court case, and issue a ruling rectifying that problem directly.

CONCLUSION

Rulings in Illinois depriving defendants of trial by jury were an egregious departure from fundamental fairness and any common sense reading of the Jones Act. The Illinois Supreme Court rightly demanded that the circuit courts of its state distribute justice fairly, without torturing the language of a statute to reach a result at odds with that state's and this nation's traditional notions

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trial rights should be determined by the procedural rules of that forum." David W. Robertson & Michael F. Sturley, *Understanding Panama R.R. v. Johnson: The Supreme Court's Interpretation of the Seaman's Elections Under the Jones Act*, 14 U.S.F. Mar. L.J. 229, 261 (2001-02) (footnote omitted). "The courts in California and Illinois that have read the *Rachal* analysis as endowing the Jones Act plaintiff with an indefeasible bench-trial option that preempts normal state-law jury-trial guarantees have committed the worst errors." David W. Robertson & Michael F. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*, 30 Mar. L. & Com. 649, 673 (1999). "[O]nce the Jones Act plaintiff has made her forum choice, the Jones Act defendant has the same rights as any other defendant in that forum. If defendants in the chosen forum normally have a right to a jury, then so does the Jones Act defendant." Robertson & Sturley, 30 Mar. L. & Com. at 673.

of fair play and justice. This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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